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Supreme Court of the United States

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No. 87-

JOHN W. MARTIN, et al.,

v.

Petitioners,

ROBERT K. WILKS, et al.,

Respondents.

No. 87-

RICHARD ARRINGTON, JR., et al.,

v.

Petitioners,

ROBERT K. WILKS, et al.,

Respondents.

No. 87-

PERSONNEL BOARD OF JEFFERSON COUNTY, et al.,

v.

Petitioners,

ROBERT K. WILKS, et al.,

Respondents.

**APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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TABLE OF CONTENTS

	Page
Constitutional Provisions and Statutes Involved	1a
Opinion of the Court of Appeals, December 15, 1987 (as amended)	3a
Order of the Court of Appeals on Petition for Rehearing and Suggestion of Rehearing In Banc, January 25, 1988	25a
Trial Transcript of the District Court's findings of fact and conclusion of law, December 20, 1985	27a
Defendants Richard Arrington, Jr. and the City of Birmingham and Defendant-Intervenors' Proposed Findings of Fact, December 20, 1985	37a
Order and Partial Final Judgment, December 23, 1985	67a
Plaintiffs' and United States' Motion to Amend Judgment	69a
Order, January 6, 1986	75a
Combined Findings of Fact and Conclusions of Law	77a
Complaint, <i>Bennett, et al. v. Arrington, et al.</i> , April 1982	110a
Consent Decree with the City of Birmingham, <i>United States v. Jefferson County, et al.</i> , signed by the parties May 19, 1981	122a
Consent Decree with the Jefferson County Per- sonnel Board, <i>United States v. Jefferson County, et al.</i> , signed by the parties May 19, 1981	202a

Page

Opinion of the District Court, <i>United States v. Jefferson County, et al.</i> , August 18, 1981 . . .	236a
Order and Judgment, <i>United States v. Jefferson County, et al.</i> , August 18, 1981	247a

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

United States Constitution

* * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Civil Rights Act of 1964

Section 703 [42 U.S.C. § 2000e-2]:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

**In re BIRMINGHAM REVERSE DISCRIMINATION
EMPLOYMENT LITIGATION**

No. 86-7108

United States Court of Appeals,
Eleventh Circuit.
Dec. 15, 1987.

[As Amended]

Before TJOFLAT and ANDERSON, Circuit Judges, and
HENDERSON, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

I.

This litigation has its origin in three employment discrimination actions filed in 1974 and 1975 against the City of Birmingham (the City), the Jefferson County, Alabama Personnel Board (the Board),¹ and various other defendants.² In January 1974, the Ensley Branch of the NAACP and seven

¹ The Board is an independent public agency that administers the civil service system in Jefferson County. One of functions is to recruit, screen, and test applicants for classified City employee positions. Employees holding classified positions include all full-time City employees except common laborers, judicial officers, elected officials, and certain executives. When a classified position opens, the Board certifies to the City a list of three eligible applicants, from which City makes its choice.

² The complaints also named as defendants the mayor of Birmingham and several officials associated with the Board. Unless otherwise indicated, we shall throughout this opinion refer to these parties collectively as "the City and the Board."

black individuals filed separate class action complaints in the district court alleging that the City and Board had violated, among other things, Title VII of the Civil Rights Act through racially discriminatory hiring and promotion practices.³ In May 1975, the United States brought suit against the same defendants, also alleging a pattern or practice of discrimination in several areas of public service employment.

The district court consolidated the three cases. In December 1976, it held a bench trial on the limited issue of the validity of entry-level tests the City and the Board used to screen applicants for firefighting and police officer positions. The district court concluded that the tests were discriminatory in violation of Title VII.⁴ In January 1977, the district court entered a final judgment on this limited issue, and the defendants appealed. This court affirmed the district court's determination of liability. *Ensley Branch of NAACP v. Seibels* 616 F.2d 812 (5th Cir.) cert. denied, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980).

The district court held a second trial in August 1979 on the issue of the validity of other testing and screening devices

³ The plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1982); 42 U.S.C. § 1981 (1982); and 42 U.S.C. § 1983 (1982).

⁴ As a remedial measure, the court ordered the Board to certify a certain number of black applicants for employment.

the Board employed. The plaintiffs' independent claims against the City, however, were not tried.

While awaiting the district court's decision in connection with the August 1979 trial, the parties entered into settlement negotiations which resulted in two proposed consent decrees: one between the City and the black plaintiffs, the Ensley Branch of the NAACP, and the United States (the City decree), and one between the Board and the black plaintiffs, the Ensley Branch of the NAACP, and the United States (the Board decree). The consent decrees set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters and the promotion of blacks to the position of fire lieutenant.⁵ Each decree specifically provided that it did not constitute an adjudication or admission of liability by the Board or the City.

After entering an order provisionally approving the decrees, the district court conducted a fairness hearing to consider the objections of interested parties. At that hearing, the Birmingham Firefighters Association 117 (BFA)⁶ filed objec-

⁵ Under the proposed City decree, which the district court ultimately approved, the City was to be enjoined permanently from engaging in discriminatory employment practice. The decree required the City to adopt as a long-term goal the employment of women and blacks in each City job classification "in percentages which approximate their respective percentages in the civilian labor force of Jefferson County." The decree set forth specific interim annual goals for the hiring of blacks in specified job classifications, including a 50% annual goal for firefighter, a 50% annual goal for fire lieutenant, and a 25% goal of engineering department positions. The proposed Board decree, which the district court ultimately approved as well, required the Board to certify blacks in numbers sufficient to meet the goals set forth in the City decree.

⁶ The BFA is a labor association of City firefighters. It represents a majority of the firefighters and negotiates with the City on their behalf.

tions as amicus curiae. After the fairness hearing but before final approval of the consent decrees, the BFA and two of its members moved, pursuant to Fed. R. Civ. P. 24(a), to intervene as of right in each of the three cases, contending that the proposed consent decrees would adversely affect their rights. The court denied the motions as untimely, and, on August 18, 1981, entered an order approving the fairness of the two decrees. Although noting that the only judicial finding of discrimination to that point had been with respect to the entry-level screening tests, the court stated that "it can hardly be doubted that there is more than ample reason for [the Board and the City] to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire department."⁷ The court concluded that "[w]hether or not the proposed decree would in each instance correspond to some finding of discrimination which this court might make . . . is not the question. The settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy." The court retained jurisdiction to enforce the decrees.

After the district court denied the motion to intervene and approved the decrees, seven white male firefighters brought suit in the district court against the City and the Board. They asked the court to enjoin the enforcement of the two consent decrees on the ground that the decrees would operate to discriminate against them in violation of Title VII. The plaintiffs applied for a preliminary injunction, but the court denied it.

⁷ The district court recited the following statistics for the police and fire departments as of July 21, 1981: "79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieutenants, captains, and battalion chiefs are black." The parties to the present litigation stipulated that in 1980 the civilian labor force of the City of Birmingham was approximately 49.9% black and 50.1% white.

The court's orders denying the motion to intervene and the preliminary injunction were appealed, and the appeals were consolidated. This court dismissed the appeal of the order denying the motion to intervene, concluding that the district judge had not abused his discretion. We pointed out that the white firefighters would not be prejudiced by the denial of intervention because they could file a separate Title VII action on their own behalf. We also affirmed the order denying preliminary injunctive relief, concluding that the individual firefighters had not carried the burden of showing irreparable harm. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

After having been denied preliminary injunctive relief, the seven white firefighters brought suit in the district court against the City and the Board. They alleged that they were being denied promotions in favor of certain black firefighters whom they asserted were less qualified, and asked the court to enjoin the City from making those promotions. Maintaining that "[t]he defendants are certifying candidates and making promotions on the basis of race under the assumed protection of the consent settlements," the seven white firefighters alleged that the City and the Board were engaged in a practice or pat-

tern of discrimination and were intentionally favoring blacks over whites in violation of Title VII and the equal protection clause of the fourteenth amendment.⁸

Several other City employees who had been denied promotions subsequently brought similar suits in the district court against the City and the Board.⁹ In addition, the United States, notwithstanding its status as a signatory of the consent decrees, brought suit against the City and the Board,¹⁰ lodging essentially the same allegations as the various individual plaintiffs.¹¹

In its answers to the complaints in these cases, the Board admitted that it had made "race conscious certifications pursuant to [the] Consent Decree, as is required by the Consent Decree." The City likewise admitted that it had made "numerous race conscious promotion and employment decisions pursuant to [the City decree's] terms." Both the City and the Board, however, denied that they had violated Title VII or the equal protection clause. Both contended that the plaintiffs were bound by the consent decrees and that the promotions

⁸ The complaint also alleged violations of the Omnibus Crime Control and Safe Streets Act of 1968, the State and Local Fiscal Assistance Act of 1972, and the fifth amendment of the United States Constitution. The plaintiff did not pursue these claims at trial and, accordingly, they are not involved in this appeal.

⁹ Suits were filed by City engineering department employees as well as fire department employees. Members of both departments are among the parties to this appeal.

¹⁰ The United States, as a signatory of the consent decrees, was originally named as a defendant in two of the reverse discrimination suits. It then moved the district court to intervene as party plaintiff in the remaining cases. The court granted the motion, and also granted the United States' motion to realign itself as plaintiff in the two suits in which it had been named as defendant.

¹¹ The United States' complaint, however, contained no mention of the consent decrees.

were therefore lawful as a matter of law because they had been made pursuant to those decrees.

Seven black individuals moved both in their individual capacities and as class representatives to intervene as parties defendant in several suits.¹² The movants sought, pursuant to Fed. R. Civ. P. 23, to represent the class of black applicants and employees that had negotiated and signed the consent decrees in 1981. Because the relief requested by the plaintiffs, if granted would foreclose future promotions of blacks under the decrees, and perhaps result in the demotion of blacks already promoted, the movants urged that they were entitled to intervene as of right under Fed. R. Civ. P. 24(a). The district court denied the motion to intervene under Rule 24(a), but granted the motion to intervene under Rule 24(b) (permissive intervention).¹³ The court also ruled that the movants could intervene only in their individual capacities.¹⁴

In April 1984 the district court consolidated the several suits for all purposes under the caption "In re Birmingham Reverse Discrimination Employment Litigation." After the parties joined issue, they engaged in extensive discovery concerning the criteria the City used when making the challenged

¹² These were the same individuals who had filed a class action against the City and the Board in 1974. At that time, they alleged that they had been denied employment or promotion due to discriminatory employment practices by the City and the Board.

¹³ In light of our discussion in Part II of this opinion, these individuals were entitled to intervene as of right because they represented the interest of persons whose jobs were directly at stake given the relief sought by the plaintiffs.

¹⁴ The court held that "[n]either Rule 23 nor Rule 24 contemplates that a class determined to exist in one case can intervene, as such class, in another case If [the movants] wish the adjudication in this case to be binding upon class, they must seek class certification as a defendant class under the procedures and requirements of Rule 23." The defendant-intervenors have not challenged this ruling.

promotions. The court then held a series of pretrial conferences in an effort to settle issues for trial. At those conferences, the plaintiffs¹⁵ made repeated requests for guidance as to what they would have to prove to make out a case of unlawful discrimination.

Without expressly so stating, the district judge treated the plaintiffs as if they were bound by the consent decrees and as if they were alleging solely that the City had violated the City decree. Specifically, the district judge treated the plaintiffs as if they were contending that the City had violated paragraph 2 of the City decree, which provides as follows:

Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer, or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

— By narrowing its attention to paragraph 2, the district court effectively transformed the plaintiffs' position from that of asserting unlawful discrimination under Title VII and the equal protection clause to that of requesting the court to enforce

¹⁵ We use "plaintiffs" to refer to both the United States as plaintiff-intervenor and the individuals who filed the reverse discrimination suits. When we refer to the latter group alone, we shall use "individual plaintiffs."

a specific provision of the City decree.¹⁶ Given this characterization of the case, the plaintiffs' claims against the Board became irrelevant.¹⁷

At trial, the parties focused on the extent to which the City had complied with paragraph 2. The plaintiffs' case consisted of three elements: (1) whether the individual plaintiffs were "demonstrably better qualified" within the meaning of paragraph 2; (2) whether the criteria that plaintiffs proposed for comparing qualifications were based on "job related selection procedures" within the meaning of paragraph 2, and (3) whether the City had in fact been aware of those criteria when it made the challenged promotions.¹⁸

At the conclusion of plaintiff's case, the court granted the Board's motion to dismiss. After further proceedings, the court entered an order in favor of the City and the defendant intervenors. The court held that the plaintiffs—both the United States and the individual plaintiffs—were bound by the consent decrees. It further held that the plaintiffs had failed in their effort to show a violation of paragraph 2 of the City decree. In

¹⁶ In effect, the court treated the plaintiffs as if they were parties to the City decrees seeking an order to show cause why the City should not be held in civil contempt for violating the terms of the decree.

¹⁷ The Board, therefore, is only a nominal party to this appeal.

¹⁸ While the first two elements were derived directly from the language of paragraph 2, the third element was implied by the district judge. The judge had informed plaintiffs' counsel at pretrial conference that "you . . . better be prepared to deal with the demonstrably better qualified issue and establish that blacks were promoted when there were demonstrably better qualified whites there on the list that the decision makers knew to be demonstrably better qualified."

fact, the court expressly found that the City “does not use a job-related selection procedure in evaluating the qualifications of certified candidates [and] has made no effort to develop . . . such a procedure.” (Emphasis added.) Thus, the court in effect held that the City had unilaterally foreclosed the plaintiffs from establishing a violation of paragraph 2: since the City did not use a job-related selection procedure, the court apparently reasoned, paragraph 2 imposed no obligations on it. Having thus disposed of the issue whether the City had violated paragraph 2, the court did not decide the plaintiffs’ Title VII and equal protection claims.

Following entry of partial final judgment for the defendants pursuant to Fed. R. Civ. P. 54(b),¹⁹ several of the individual plaintiffs appealed, as did the United States. Because the district court erred in holding that the individual plaintiffs were bound by the consent decrees, we reverse and remand with instructions that the district court try their claims of unlawful discrimination. We affirm the district court’s dismissal of the United States’ claims.

II.

With respect to the individual plaintiffs, the issue on appeal is whether they are precluded by the consent decrees from bringing an independent Title VII suit against the City and the Board asserting that actions taken pursuant to those decrees have resulted in unlawful discrimination against them. Because we conclude that these plaintiffs were neither parties nor privies

¹⁹ The order of partial final judgment provided that it did not affect the counterclaims pending against the United States. These counterclaims, lodged by the City and the defendant-intervenors, alleged that the United States had failed to fulfill its obligation as a signatory of the consent decrees to “defend the lawfulness of . . . remedial measures [under the decrees] in the event of challenge by any other party.” The City and the defendant-intervenors requested the court to dismiss the United States’ complaint in intervention and enter an order in the earlier cases directing the United States to comply with its obligation to defend the decrees.

to the consent decrees, we hold that their independent claims of unlawful discrimination are not precluded.

As the district court recognized, the parties to a consent decree cannot attack the decree after it has been entered. With respect to the preclusive effect of a consent decree on nonparties, however, the same principles of res judicata and collateral estoppel that govern ordinary judgments come into play. *United States v. Jefferson County*, 720 F.2d 1511, 1517 (11th Cir. 1983). An examination of those principles is thus essential to our analysis.

It is a fundamental premise of preclusion law that “[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated.” *Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir. 1985). As the Supreme Court has emphasized, this premise is required by due process: “[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 99 S. Ct. 645, 649 n.7, 58 L.Ed.2d 552 (1979).

Some courts, however, have seen fit not to apply this aspect of preclusion law to consent decrees in Title VII cases. See, e.g., *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982) cert. denied, 464 U.S. 900, 104 S. Ct. 255, 78 L.Ed.2d 241 (1983); *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980). Instead, these courts have decided to clothe consent decrees with the doctrine of “impermissible collateral attack,” thereby immunizing parties to a consent decree from charges of discrimination by nonparties, provided the allegedly discriminatory acts were taken pursuant to the consent decree. Courts taking this approach have emphasized the need to encourage voluntary agreements intended to eradicate race discrimination, and have reasoned that to permit third party attacks would discourage parties from negotiating such agreements.

Although we also recognize the strong public policy in favor of voluntary affirmative action plans, we have rejected the "impermissible collateral attack" doctrine "to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights." *Jefferson County*, 720 F.2d at 1518. A contrary rule would amount to an exception to the res judicata and collateral estoppel law that we presently apply. *Id.* It would also contravene the strong public policy of including all interested parties in settlement negotiations in order to avoid subsequent suits and dissatisfaction caused by exclusion. In light of the due process underpinnings of preclusion law, and in light of public policy considerations, we are unwilling to recognize such an exception. Thus, even if a consent decree purports to affect the rights of third parties, those parties are not bound by the terms of the decree unless their interests were adequately represented by a party to the decree. See *Local No. 93 v. City of Cleveland*, ___ U.S. ___, 106 S. Ct. 3063, 3079, 92 L.Ed.2d 405 (1986) ("A court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting [parties]; if properly raised, these claims remain and may be litigated by the [nonconsenting parties]."). The policy of encouraging voluntary affirmative action plans must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed. See *Firefighters Local Union No. 1784 v.*

Stotts, 467 U.S. 561, 589 n.4, 104 S. Ct. 2576, 2593 n.4, 81 L.Ed.2d 483 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees.").

The individual plaintiffs were parties to neither the City decree nor the Board decree. Indeed, their Title VII claims did not accrue until after the decrees became effective and the challenged promotions were made; that is, their claims did not accrue until they were denied promotions.

Nor did the individual plaintiffs have an identity of interest with a party to the consent decrees such that they should be treated as parties for preclusion purposes. The BFA, an organization to which the plaintiffs in the fire department belong, did attempt with two of its members²⁰ to intervene in the original suits, but the court denied intervention as untimely.²¹ The BFA also filed objections as amicus curiae at the fairness hearing the district court held before approving the decrees. That participation, however, hardly made the BFA a party to the consent decrees. As we have indicated above, a consent decree by definition binds only those who explicitly or implicitly consent to it. See *Jefferson County*, 720 F.2d at 1518 n.19.

Of course, the City did consent to the decrees, and one might argue that the individual plaintiffs as City employees

20 The two BFA members who unsuccessfully sought to intervene in the original employment discrimination suits are not named as plaintiffs in any of the reverse discrimination suits. The individual reverse discrimination plaintiffs who are firefighters belong to the BFA. Their counsel, Mr. Fitzpatrick, represented the BFA when it filed objections as amicus curiae at the fairness hearing.

21 At first blush, it may appear anomalous that we now hold that the individual plaintiffs are not bound by the decrees while we earlier affirmed the district court's denial of the BFA members' motion to intervene in the cases from which the decrees arose. As our opinions here and in *Jefferson County* demonstrate, however, the issues of intervention and preclusion involve entirely different analyses. Indeed, as we took pains to point out in *Jefferson County*, the denial of the motion to intervene was not prejudicial to the movants partly because they were not precluded from instituting an independent Title VII suit. *Jefferson County*, 720 F.2d at 1518.

shared an identity of interest with the City such that they are now bound. However, the record fails to indicate that the City mounted a vigorous defense to the allegations leveled against it before entering into settlement negotiations. Indeed, the district court never tried the independent claims against the City. Consequently, it is far from clear that the City in any way adequately represented the individual plaintiffs' interest in the events leading up to the entry of the decrees. Moreover, it is not clear that the plaintiffs and the City shared any identity of interest at all. The City's various interests in this dispute conceivably may have conflicted in part with the plaintiffs' single interest in preserving preexisting promotion opportunities. Indeed, the City's interests were antagonistic in that it had every reason to avoid a determination of liability and little reason to object to the promotion of aspect of the settlement. The settlement did not require the City to make any additional promotions, but only to reallocate the promotions that it would have made in any event. In real terms, the relief contemplated by the decrees was to come not from the hands of the City, but from the hands of the employees who would have otherwise received the promotions. At the very least, the City was in the position of a disinterested stakeholder with respect to the contested promotions. Given the disparate interests of the City and the individual plaintiffs, it is clear that the City could not have served as an effective surrogate for the individual plaintiffs' interests when it negotiated the plan incorporated into the consent decrees. Accordingly, it would be impossible to conclude that these plaintiffs are in any way bound by those decrees.

As we have stated before, "[t]he judge must be cautious in approving consent decrees only to the extent that he should be aware the decree is more likely to be of little effect the fewer parties there are in the suit to be bound." *Jefferson County*, 720 F.2d at 1518 n.19; see *City of Cleveland*, ___ U.S. ___, 106 S. Ct. at 3079 ("Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement."). Thus, to avoid claims such as those that have risen in the present case, it is incumbent upon the district judge to ensure before entering a consent decree that the interests of all real parties in interest have

been adequately represented. See *Stotts*, 467 U.S. at 588 n.3, 104 S. Ct. at 2593 n.3 (O'Connor, J., concurring) ("[I]f innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process."). If the plan affects promotion practice so as to alter or abolish the promotion opportunities of existing employees, those employees must be represented as parties to the decree if they are to be bound by it.

III.

Having concluded that the individual plaintiffs are not bound by the consent decrees, we remand with instructions that the district court try the plaintiffs' claims of unlawful discrimination. Because the defendants concede that the challenged promotions were made in a race conscious manner, and because the defendants seek to use the consent decrees to justify their actions, we feel compelled to provide the district court with some guidance as to the legal significance of a consent decree in Title VII litigation when, as in this case, an employer seeks to interpose it as a defense against employees who were neither parties nor privies to it.

The Supreme Court's interpretation of Title VII's application in reverse discrimination suits was recently articulated in *Johnson v. Transportation Agency*, ___ U.S. ___, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987). In *Johnson*, the Court upheld against Title VII attack a county's promotion of a woman over a marginally better qualified man pursuant to a voluntary affirmative action plan. Under the plan, which set as a long-range goal the creation of a workforce in which women and minorities were proportionately represented according to their representation in the area labor market, the county authorized its officials to consider, among other factors, race and gender when making promotion decisions. Following the promotion of a woman pursuant to the plan, a male employee who had been passed over filed a Title VII suit.

Guided by its decision in *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979) the Court set forth a two-part inquiry to be used when a Title VII defen-

dant seeks to use a voluntary affirmative action plan to justify a race or gender conscious employment decision. First, consideration of the race or gender of promotion candidates must be "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women [or minorities] in 'traditionally segregated job categories.'" *Id.* at ___, 107 S. Ct. at 1452 (quoting *Weber*, 443 U.S. at 197, 99 S. Ct. at 2724 (1979)). The manifest imbalance "need not be such that it would support a prima facie case [of discrimination] against the employer." *Id.* With respect to the specific facts before it, the Johnson Court concluded that women had been "egregiously underrepresented" in the relevant job categories, noting that "none of the 238 positions was occupied by a woman." *Id.* at ___, 107 S. Ct. at 1454.

Second, to withstand Title VII scrutiny, the voluntary affirmative action plan must not "unnecessarily trammel[]" the rights of nonminority employees or "creat[] an absolute bar to their advancement." *Id.* at ___, 107 S. Ct. at 1455. In holding that the plan before it was tailored narrowly enough to meet this second requirement, the Court emphasized that "the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.* The Court concluded that "[t]he Plan thus resembles the 'Harvard Plan' approvingly noted by Justice POWELL in *University of California Regents v. Bakke*, 438 U.S. 265, 316-319, 98 S. Ct. 2733, 2761-63, 57 L.Ed.2d 750 (1978), which considers race along with other criteria in determining admission to the college." *Id.* The Court also noted that the petitioner remained eligible for other promotions when they came open.

On remand, we direct the district court to evaluate the defendants' justification for the challenged promotions under the standards articulated in *Johnson*. In an analytical sense, this case differs from *Johnson* only to the extent that defendants point to a consent decree, rather than a voluntary affirmative action plan, to justify their race conscious promotion decisions. We perceive no reason for treating a consent decree entered pursuant to a voluntary settlement²² differently from a voluntary affirmative action plan. In both instances, the employer has embarked on a voluntary undertaking; we reject any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination. A contrary conclusion would fly in the face of our earlier observations about the preclusive effect of such decrees.²³

The reasons for according a consent decree no more weight than a voluntary affirmative action plan when the consent decree is offered as justification for a race conscious employment decision are especially strong where, as here, vitally interested parties are not parties to the plan incorporated into the decree. The City Decree does contain a provision—paragraph 2—that facially serves to protect the interests of non-minority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City

22 It should be emphasized that there has been no judicial determination that the City is liable for past discrimination with respect to its promotion practices. The only finding of discrimination related to the adverse impact of entry-level screening examinations. *See supra* note 4 and accompanying text. Thus, with respect to the promotion practices upon which plaintiffs base their claims, we are not presented with a case in which the defendant was required by law to implement an affirmative action program designed to remedy the effects of past discrimination.

23 Likewise, the consent decree in this case must be considered equivalent to a voluntary affirmative action plan for purposes of equal protection analysis. The Supreme Court addressed the equal protection obligations of an employer who has instituted a voluntary affirmative action plan in *Wygant v. Jackson Bd of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L.Ed.2d 260 (1986).

decree permits the City to make race conscious promotions without using *any* job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

IV.

Our disposition of the United States' appeal involves a separate analysis. As the district court correctly observed, the United States is estopped from collaterally attacking the consent decrees because it is a party to them. Moreover, we hold that the United States, as a party to the decrees, may not pursue its claims as plaintiff intervenors in the present cases. The court that entered the consent decrees retains jurisdiction over the cases out of which the decrees arose, and the United States' remedy, if it believes that the City has violated the terms of the decrees, is to seek an order to show cause why the City should not be held in civil contempt. See *Newman v. State*, 683 F.2d 1312, 1318 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S. Ct. 1773, 76 L.Ed.2d 346 (1983). Likewise, if the United States believes that the decrees should be modified based on changed circumstances, its remedy as a party to the decrees is to seek modification in the court which retained jurisdiction over the cases in which the decrees arose. *Id.* at 1318 n.15. Accordingly, the United States' status in the present litigation is in effect merely that of an amicus curiae.

V.

To summarize, the district court correctly dismissed the United States' claims. The district court erred, however, in holding that the individual plaintiffs were bound by the consent decrees. Accordingly, it must on remand try those plaintiffs' claims of illegal discrimination.

AFFIRMED in part, REVERSED in part and REMANDED.

ANDERSON, Circuit Judge, dissenting:

Respectfully, I dissent. In my judgment, the opinion for the court ignores an important holding in *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). In *Jefferson County*, the BFA and two white firefighters, who are probably in privity with the individual plaintiffs in the instant case, sought to intervene in the litigation which resulted in the consent decree at issue in this case. This court affirmed the district court's denial of intervention, holding that those intervenors "knew at an early stage in the proceedings that their rights could be adversely affected, as was evidenced by their conversations with the City regarding the tactics the City should take in defending the action," *id.* at 1516. In analyzing the prejudice prong of the intervention question, this court addressed the preclusive effect of the consent decree on the intervenors and held:

Naturally, that the employer undertook the challenged action pursuant to a court-approved consent decree . . . would be evidence of non-discriminatory intent by the employer.

Id. at 1518. I dissent because the opinion for the court in this case ignores the holding just quoted from the previous litigation in *Jefferson County*. In determining whether the City has discriminated against the instant plaintiffs, *Jefferson County* requires that the trial judge consider as evidence of nondiscriminatory intent¹ the fact that the City's action was taken pursuant to the consent decree. Ignoring this mandate from *Jefferson County*, the opinion for the court instructs the district

¹ Because I write only in dissent, I need not resolve the question reserved in *Jefferson County* as to whether the fact that the City merely followed the consent decree would conclusively establish that the City is not liable under Title VII.

judge on remand merely to evaluate the validity of the consent decree.

In my judgment, the appropriate resolution of this case would distinguish between the individual plaintiffs' claim for back pay and their claim for prospective relief. With respect to their back pay claim, they will have to establish that the City intentionally discriminated against them, and their attempt will probably be defeated under the *Jefferson County* rationale by the evidence that the City was merely implementing the consent decree. This result is consistent with the demands of equity. It would be anomalous for the City to be liable to the instant plaintiffs for actions that the City was required to take on pain of being held in contempt at the hands of the black employees who were parties to and beneficiaries of the consent decree. This result is especially appropriate here in light of *Jefferson County's* holding that parties in privity with or situated similarly to the instant plaintiffs knew at an early stage in the original litigation that their rights could be adversely affected, consulted with the City regarding defensive tactics, but made an "ill-advised decision" not to intervene in timely fashion deciding instead to rely on the City to advance their interests. 720 F.2d at 1516-17.

This result also is supported by an analysis of § 713(b) of Title VII, 42 U.S.C. § 2000e-12(b)(1) and the applicable EEOC regulations. Section 713(b) provides that no Title VII liability results from an employer's good faith reliance on or adherence to "any written interpretation or opinion of the Commission."² The relevant "written interpretation" of the

² Section 713(b) of Title VII, 42 U.S.C. § 2000e-12(b)(1) provides in relevant part:

In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . .

EEOC³ is 29 C.F.R. § 1608.8, which provides, in part, that "[t]he Commission interprets Title VII to mean that actions taken pursuant to the direction of a court order [including a consent decree] cannot give rise to liability under Title VII."⁴ Thus, the City could rely upon the written interpretation of the EEOC to the effect that the City is precluded from retrospec-

³ A "written interpretation or opinion of the Commission," as defined by the EEOC procedural regulations, includes "[m]atter published and specifically designated as such in the F[ederal] R[egister]. . . ." 29 C.F.R. § 1601.33(b). Here, the relevant EEOC regulation, 29 C.F.R. § 1608-8, was published in the Federal Register as part of a set of guidelines promulgated by the EEOC to "clarify and harmonize the principles of Title VII. . . ." 29 C.F.R. § 1603.1(a). Section 1608.2 of the guidelines specified that the guidelines "constitute 'a written interpretation and opinion' of the Equal Employment Opportunity Commission as the term is used in [Section 713(b) of Title VII] and § 1601.33 of the procedural regulations of the Equal Employment Opportunity Commission. . . ." 29 C.F.R. § 1608.2. Consequently, Section 1608.8 constitutes a "written interpretation" under Section 713(b) of Title VII.

⁴ 29 C.F.R. § 1608.8 provides:

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of the United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a federal, state, or local equal employment opportunity law regulation, is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commissioner will investigate to determine: (a) whether such an order exists and (b) whether adherence to the affirmative action plan which is part of the order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. *The Commission interprets Title VII to mean that actions taken pursuant to the direction of a court order cannot give rise to liability under Title VII.* (Emphasis supplied).

tive Title VII liability because of its compliance with the consent decree.⁵

On the other hand, plaintiffs' claim for prospective relief will not be affected in the same way by the existence of the consent decree. In their claim for prospective relief, the validity of the consent decree is itself at issue. I agree with the opinion for the court that these plaintiffs were not parties to the prior litigation which resulted in the consent decree, and that the instant plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree prospectively and test its validity against the recent Supreme Court precedent. See *Johnson v. Transportation Agency*, ___ U.S. ___, 107 S. Ct. 1442, 94 L.Ed.2d 615 (1987).

⁵ I note that the Seventh Circuit has held that a consent order does not constitute a "written interpretation or opinion of the Commission" within the meaning of § 713(b) of Title VII. *Eirhart v. Libbey-Owens Ford Co.*, 616 F.2d 278 (7th Cir. 1980). That court, however, apparently overlooked the provision of the regulation upon which I rely. Instead, it evaluated the consent order under subsection (a) of 29 C.F.R. § 1601.33. My analysis is based upon subsection (b) of 29 C.F.R. § 1601.33; therefore the conclusion in *Eirhart* is inapposite to this case.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NO. 86-7108

In Re: BIRMINGHAM REVERSE DISCRIMINATION
EMPLOYMENT LITIGATION

Appeal from the United States District Court for the
Northern District of Alabama

Filed, United States Court of Appeals, Eleventh Circuit
January 25, 1988

*ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING IN BANC*

(Opinion December 15, 1987, 11 Cir., 198_, ___ F.2d ___).
()

Before TJOFLAT and ANDERSON, Circuit Judges, and
HENDERSON, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
United States Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re:

**BIRMINGHAM REVERSE
DISCRIMINATION
EMPLOYMENT LITIGATION**

**CIVIL ACTION NO.
CV 84-P-0903-S**

[TRIAL TRANSCRIPT]

VOLUME IX

December 20, 1985
9:08 A.M.

[Text Omitted.]

THE COURT: The Court will now dictate its findings of fact and conclusions of law. These findings of fact are based upon the evidence that has been presented over the past four and a half days, consisting of the testimony of various witnesses and the reception into evidence of voluminous documents.

I state at the outset that the conclusion that I reach is to be favorable to the defendants.

Basically the issue, the legal issue, which, as I view it, is determinative of this case is one that was stated in an order entered back in February of this year.

The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.

In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent

decree, and if in fact the City was required to do so by the consent decree, then they would not be guilty of racial discrimination, either under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it.

Counsel have amply noted that the law is not clear, however, in this regard. And that this decision is being made at a time when there is uncertainty as to the state of the law.

In the effort to determine what the state of the law is, as best I can determine it, I have considered no single decision. As I evaluate the decisions particularly out of the Supreme Court, it becomes apparent to me that if you look at any one given decision, you can come up with a conclusion as to what the law is which is different from the decision you reach if you look at some other decision. And is required as a result somehow attempting to synthesize what I view to be a development in the law as yet not fully and finally defined.

Much argument has been made as this case came to trial about the burden of proof. I declined in advance of trial to rule definitively on certain hypothetical issues, because I wish to see the state of the evidence as it was presented. I am persuaded that at least in that respect my earlier decision was proper. Because it has become clear to me from the evidence in this case that it is not necessary for the Court to determine whether some action apparently permitted by the consent decree but not mandated by it would be protected against claims of discrimination.

In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree.

I reach that decision on the basis that the language that has become the focus of these proceedings, namely language in paragraph two of the consent decree, would require or would allow an exception to the goals otherwise stated for the City in other provisions of the decree only if the decision-makers at the time of making the decision had information demonstrating that

a black, although qualified, was demonstrably less qualified than a white on the basis of a job-related selection device.

During the presentation of evidence here, the only possible job-related selection device that has been presented is that of the test that the Personnel Board uses. Many other criterion have been selected, none have been in any way indicated or demonstrated as being job related. Job related in this sense must be addressed in the context of the regulations under Title 7, which were in force at the time the consent decree was adopted, and indeed continued in force.

In this particular case, the tests used by the Personnel Board have simply been assumed to be valid, that is, job related. However, the evidence demonstrates that the decision-makers on the part of the City did not have the information available to them on which they could have made any kind of judgment that the blacks scoring lower on those exams scored sufficiently lower to be demonstrably less qualified than the whites who were higher ranked.

I had anticipated until this morning that at the conclusion of the case and while still attending to the case I would attempt at the conclusion of the case to dictate findings of fact in my normal manner. That is, I had anticipated that I would simply from my own memory and recollection go through the various items of evidence and make the appropriate findings with respect to the variety of issues and persons involved.

I am varying from that today in doing something that I have done only once before that I can recall. The reason for doing so is that I have received this morning some findings of fact proposed by the defendants that I find to be ninety-eight percent objective, fair and the same findings I would make.

The appellate decisions have cautioned trial courts against simply adopting proposed findings submitted by parties. I am aware of the admonition. I have, however, gone through these proposed findings and will in just a few minutes indicate certain changes that I would make in them. To the extent I do not make changes, I adopt them as my own individual findings. This is both as to findings of fact and conclusions of law. There are in addition a few facts not contained in the findings of fact

proposed by the defendants that I will recite as findings of fact by the Court.

First, I will attend to several matters that were not covered by the defendants' proposed findings of fact. Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer or who claims that he was delayed in such an appointment was adversely affected because he was white. Those persons in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

Most but not all of those whites who were not selected for those positions had higher test scores on the test administered by the Personnel Board. Although the scores, as I have already indicated, were not known by the decision-makers at least with a sufficient degree of accuracy and completeness to make any judgment concerning the significance of those differences.

Several of the whites who were unsuccessful in their promotional efforts or who were delayed in those promotional efforts not only had higher test scores than the blacks who were selected but had scores which were sufficiently higher on the test that using the techniques of statistical inference would have indicated that the true test score of the white was statistically significantly greater than the true test score of the black. I state that that is true for some of the whites involved but certainly not all.

I make particular mention, although it is contained in the proposed findings of fact submitted by the defendants, that the practice of the fire department both before and after the consent decree was to not consider qualifications in making promotions but instead is to follow willfully the certification list submitted by the Personnel Board, simply selecting the higher ranked person, whether qualified or not.

Only since the consent decree has that been changed one occasion, and that was at a time at deciding that a black who otherwise would have been mandated for promotion under the decree was not qualified. This Court upheld the decision by the City that under the particular facts of that case and that situation the black was not qualified.

With respect to the vacancy in the engineering office, the Court makes the following conditional matter that is perhaps not that explicit in the proposed findings submitted by the defendant. The white who would have been appointed to the position of civil engineer and who certainly was qualified for that position did score higher on the test than did the black who was selected. He, I am referring to Mr. Ware, is the individual who would have been selected by the chief engineer for that position had it not been for the consent decree. In noting, however, that the rankings and test scores coming from the Personnel Board were not in the engineering department deemed to be particularly valuable or useful, the chief engineer would have selected that individual Mr. Ware, even though he scored much lower than another white individual, that is the difference between his score and another white was even greater than the difference between Mr. Ware's score and the black.

Furthermore, the chief engineer in his deposition testimony indicated candidly that he considered the race of Mr. Thomas, person ultimately chosen, being black, as a negative feature. And that he would have so considered that as a negative feature, but for the fact that the consent decree required him to look otherwise at the candidate. He also noted in his deposition that although he would have preferred because of his view of the experience factor and certain other characteristics, the appointment of Mr. Ware, he could not say that Mr. Ware was to any significant degree better qualified than the person he chose, namely the black Mr. Thomas.

Now, with those additional matters being recited as findings of the Court, I will go through the proposed findings of fact submitted by the defendants and make certain revisions.

On page five, paragraph thirteen, the last — starting with the words and similar underrepresentation, at that point the

paragraph will simply read underrepresentation continues even with the actions taken under the consent decree to this day. And the following sentence will be deleted.

On page thirteen, paragraph forty-five, that item will be revised to read as follows: Dr. Siskin did not in view of the Court's limitations as to the scope of trial conduct any studies to attempt to determine whether the Personnel Board's examinations are job related.

On the same page, paragraph forty-seven, it should read as follows: Dr. Siskin concluded that at the 0-5 level of significance several non-selected whites' true test scores exceeded the true test scores of selected blacks by four or more SEM's.

On page fifteen, paragraph fifty-four, in the third line, the word rank or, r-a-n-k space o-r, those two words are deleted.

On page seventeen, paragraph number sixty, the second sentence is revised to read as follows: This underrepresentation resulted at least in part from discrimination against blacks. On page eighteen, paragraph sixty-three, that paragraph is deleted. On page twenty-two paragraph seventy-eight, the first sentence should read as follows: Moreover the evidence reflects that over the history of this program blacks have had — excuse me, whites have had a somewhat greater opportunity than blacks to achieve medic status. On that same page, the parenthetical sentences at the bottom of the page are deleted.

On page twenty-three, in paragraph seventy-nine, the third sentence it should read a lead worker assist his or her lieutenant. The words "or her" being added.

In paragraph eighty-one on the same page, that is rewritten to state the lead worker position is usually assigned on the basis of station seniority. On the next page, page twenty-four, paragraph eighty-four, that first sentence should read as follows: Additionally, as is the case with all criteria based substantially on seniority, blacks have not, as a whole, had the same opportunities as white to meet this proposed criterion.

On page twenty-seven, paragraph ninety-six, is simply a typographical correction in the spelling of the word "selection." On page twenty-eight, paragraph ninety-eight, the last sen-

tence, a typographical correction, the spelling of the word "consider." On page thirty, paragraph one hundred and ten, that paragraph is deleted.

On page thirty-three paragraph one hundred and twenty-three the figures twenty-five percent are changed to fifty percent. On paragraph thirty — excuse me, on page thirty-five, paragraph one thirty-five, that should read in appropriate part, a selection procedure which relies in substantial part on subjective criteria is not a related selection procedure within the meaning of paragraph two within the City decree.

On page thirty-eight, in paragraph one forty-three, the footnote is deleted. On page forty, paragraph one forty-nine, that paragraph is deleted. On page forty-one paragraph one fifty, the following shall stand as paragraph one fifty: The City decree entered by this Court immunizes the City from liability for actions required by it. Any questions concerning this proposition should be dispelled in this Circuit under the present state of the law by the decision of the Court in Palmer versus District Board. That will stand in place of what was written in paragraph one fifty.

In paragraph one fifty-two on page one forty-one and going over to page forty-two is deleted. On page forty-two paragraph one fifty-three the following is substituted: Information or opinions not known to the decision-maker may not be utilized to establish that the individual selected — excuse me, that there were job related selection devices showing one candidate demonstrably better qualified than another.

In paragraph one fifty-four on the same page, the third line, the word "subject" is eliminated and substituted in its place the word "suspect," s-u-s-p-e-c-t. Two lines below that, the word "contemplated," that word is to be eliminated and instead the word "affected" is substituted for that word.

These findings and conclusions are entered at this time along with the findings and conclusions indicated at the outset of this recitation.

Entry of judgment should not be delayed or deferred. However, I am going to call upon counsel to submit to me on

Monday an appropriate form of judgment that simply indicates that in accordance with the findings and conclusions dictated or incorporated by the Court in its oral charge that certain cases or claims are dismissed and directing under Rule 54-B that those findings and resolutions be made final.

I say that I ask this because there is some difficulty — I believe this case fully disposes of or resolves at the trial level the Bennett decision. But I don't believe that is so with respect to the case in which Mr. Ware had his claims, or at least I am not sure it does, and so there would have to be a 54-B finding in that case. Also since these cases were a part of a larger group of cases consolidated under the name Birmingham Reverse Employment Discrimination Case, it is for safety's sake appropriate to use 54-B to make sure that there is no question as to finality by virtue of those other cases not having been resolved at this time.

It is for that reason that I call upon counsel to make some analysis to present me with an appropriate one-page order is all it requires which clarifies which cases are due to be resolved as a result of this decision favorable to the defendants.

Cost but no attorneys' fees are taxed against the plaintiffs in this case. It is clear that there is sufficient merit in these cases to justify the pursuit of them. I say that both on a subjective and objective basis and that claims by a prevailing defendant under the Christian, Burg, Garment case would not justify an award of attorneys' fees against the plaintiffs even though the defendants have prevailed. There may be some question as to whether some change in the standards when you are talking about a reverse discrimination case, but at the present time I am persuaded that Christian, Burg, Garment is the applicable standard to be applied here, even though the — with the defendants having prevailed.

Let me stop at this point and see if counsel — I am obviously not asking for — but if counsel have any questions about the Court's ruling, the nature of it and what you are called upon to do and if you think I have totally left out a subject area that perhaps should be included in the findings. Of course, it's not to cut off a request post-judgment for additional findings, I am

not asking for a waiver in that. It may be since I am sure plaintiff's counsel have not had the opportunity to fully go through these items and compare them with ones that you might want a finding on, I didn't want to place in those findings that I think are particularly favorable to the plaintiffs to help put this case in the appropriate context which had not been included in the defendant's proposal.

Do counsel know of anything that — at the present time they would ask me to consider?

MR. FITZPATRICK: Your Honor, you are correct that we have not had an opportunity to read this which was served at, I guess about twelve noon.

With respect to the other consolidated cases, I think it would be appropriate that if there is an appeal, that some mechanism be provided for keeping those matters on hold in the event there are additional claims filed during the process in which these matters are ultimately resolved on appeal, if appealed, we also set up a mechanism for that.

THE COURT: As to those other cases, I really was not suggesting anything at the moment other than to make sure the presence of those other cases did not affect the appealability of this decision.

MR. ALEXANDER: Your Honor, from the City, I think one concern we would have is trying to avoid a repetition of the expense attended to this matter. And perhaps we can work out some way to keep the other cases in a state of limbo until this is resolved.

THE COURT: Either that or could even be that the ultimate findings that I made here are sufficiently — some of the ones are going to be involved that something in the nature of a summary judgment could be done so that those cases get to be reviewed at the very same time. That's simply something for y'all to discuss. Certainly there seem to be several possible ways of addressing this. But certainly many of the issues —

MR. ALEXANDER: The one thing I don't want to do is start police depositions Monday.

MR. FITZPATRICK: Me too.

THE COURT: I am sure of it.

MS. MANN: One point of clarification, do you want to meet with counsel on Monday or do you just want a written —

THE COURT: I would assume that there is some one plaintiff's lawyer that is in Birmingham and some one defendant's lawyer that is in Birmingham that can come to me with a one-page document and say Judge, this I think is what you are looking for. We don't agree with it, we as plaintiffs, but this is what you were trying to do in order to permit the appealability decision. I am not looking for counsel to be around, other than somebody on behalf of the plaintiffs and somebody on behalf of defendants. Thank you very much.

THE ABOVE WAS ALL OF THE FOREGOING PROCEEDINGS

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re:

**BIRMINGHAM REVERSE
DISCRIMINATION
EMPLOYMENT LITIGATION**

**CIVIL ACTION NO.
CV 84-P-0903-S**

**DEFENDANTS RICHARD ARRINGTON, JR.,
THE CITY OF BIRMINGHAM AND
DEFENDANT-INTERVENORS' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendants Richard Arrington, Jr., the City of Birmingham, and Defendant-Intervenors ("defendants") submit the following Proposed Findings of Facts and Conclusions of Law to assist the Court in considering defendants' Motion for Involuntary Dismissal at the close of plaintiffs' case.

FINDINGS OF FACT

1. The individual plaintiffs are white males, employed by the City of Birmingham in its Engineering Department or the Birmingham Fire and Rescue Service ("BFRS"), who contend that they have been unlawfully denied promotions on the basis of their race.

2. Also a plaintiff is the United States Department of Justice, an intervenor on the side of the plaintiffs. ("Plaintiffs" will hereafter refer to the individual plaintiffs and the United States collectively. When collective use is inappropriate, the Court will refer to "individual plaintiffs" and "United States" or "government".)

3. Defendants Richard Arrington, Jr., and the City of Birmingham (collectively the "City") admit that the Engineering Department and the BFRS have considered race in making promotions, but deny discriminatory intent, and proffer as their legitimate, non-discriminatory motive compliance with a Consent Decree entered in *United States v. Jefferson County*, 28

FEP Cases 1834 (N.D. Al. 1981) (the "City Decree"); discussed more fully below.

4. Defendant-intervenors represent the interests of the original black plaintiffs ("Martin plaintiffs") in *Martin v. the City of Birmingham*, as well as those of the beneficiaries of the relief won by the *Martin* plaintiffs and their certified classes. They join in the City's defense that the preferential promotion of blacks was legal pursuant to the City Decree.

5. On August 21, 1981, this Court entered an Order in *United States v. Jefferson County* approving as fair two consent decrees: one (heretofore designated as the "City Decree") between the City, the *Martin* plaintiffs, and the United States, executed May 19, 1981; and one between the Jefferson County Personnel Board (the "Board"), the *Martin* plaintiffs, and the United States (the "Board Decree"), also executed May 19, 1981.

6. Resolution 547-81 authorized the Mayor to enter into the City Decree (United States Exhibit 3 to Gordon Graham 1985 Deposition).

7. The decrees generally required the City to attempt to meet certain long term and short term goals set forth in the City Decree, and the Board to "certify" to the City (as required by Alabama law under the Civil Service System ("Enabling Act")) sufficient numbers of black applicants to enable the City to meet his goals.

8. The individual plaintiffs contend that the City Decree is illegal and does not relieve the City from liability to whites who were "passed over" for promotion on account of their race. The government does not join the individual plaintiffs in their contention that the Decree is unlawful.

9. The individual plaintiffs and the government both contend that the City has exceeded the requirements of the City Decree and is hence not protected thereby. That argument consists of two necessary premises: that only employment decisions "mandated" in the sense of being required by the City Decree can provide the City with immunity for its race-conscious promotions; and that the City Decree does not require the promotion of less qualified blacks over demonstrably bet-

ter qualified whites. The latter contention is grounded on ¶ 2 of the City Decree, which provides, in relevant part, that the City is not required to promote a less qualified black in preference to a demonstrably better qualified white, as determined by the results of a job related selection procedure. They thus contend that the promotion of a demonstrably less qualified black is not protected by the City Decree.

10. The individual plaintiffs contend that all blacks promoted in the Engineering Department and the BFRS since the entry of the City Decree are demonstrably less qualified than the white plaintiffs; the United States contends that only some of the white plaintiffs are demonstrably better qualified than some of the black promotees. Additionally, both the individual plaintiffs and the United States contend that some of the black promotees were unqualified for promotion at the time of their promotion.

11. In response, the City and Defendant-Intervenors contend that any action contemplated by, or made as a direct consequence of, the City Decree is lawful, and that the promotion of qualified, but demonstrably less qualified, blacks is contemplated and permitted by the City Decree. They further contend that in order to meet the goals provisions of the City Decree, the City is required to promote any black individual whom the City could not prove to be demonstrably less qualified according to the results of a job related, validated, selection procedure. Finally, the City and defendant-intervenors contend that, in any event, none of the blacks promoted are unqualified, or demonstrably less qualified, according to the results of job related selection procedure.

12. In *United States v. Jefferson County*, *supra*, this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358 (5th Cir. 1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error.

13. To the contrary, the employment statistics reflect that blacks were seriously underrepresented in City employ-

ment, specifically in the Engineering Department and BFRS, at the time the City Decree was entered (during the 1950's, there was a period of time where blacks were not allowed to take the firefighter (Tr. (Pope)) or the civil engineer (Ex. 1982, 1983 examinations), and similar underrepresentation continues to this day. The evidence further reflects that, absent the Consent Decree, the record of the BFRS with respect to the employment of blacks throughout the department would be as abysmal as its record when the City entered into the Decree (*See generally* Ex. 23 I.A-H).

14. Nor are the interest of whites trammled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created. (*See generally*, certifications of eligibles.)

15. It is uncontested that the City, in its Engineering Department (*compare* Duncan 1982 dep. 46-47 with Duncan 1985 dep. 42) and the BFRS (Gallant dep. 663), has followed the same general promotional practices since the entry of the City Decree as were in place before the entry of the City Decree, the only material difference being that the City now considers the goals of the City Decree in making promotional decisions.

16. In the BFRS, it was Chief Gallant's pre-City Decree practice to review the personnel file of the certified individuals (Gallant dep. 488-89; Laughlin dep. 165), consult with Deputy Chief Laughlin, consider any other information he had received concerning the "certified eligibles" (Gallant dep. 214, 278, 529) (although he did not actively seek such information), and promote the eligibles in the order in which they appeared on the certification, absent a reason to believe they were not qualified to perform the duties of the position for which they were being considered (Gallant dep. 476-78; Laughlin dep. 141, 253, 328, 343, 452). The Chief made no effort to compare the qualifications of the certified individuals; the only decisions he made were whether he could prove that they were not qualified (Gallant dep. 140-41, 476; Laughlin dep. 361, 646).

17. The general procedure Gallant followed before the entry of the City Decree has not changed (Gallant dep. 663). The only material change in Chief Gallant's procedure since the entry of the Decree is that he now alternates between blacks and whites, selecting in each case the highest ranked white or black, as appropriate under the City Decree (Gallant dep. 368, 391-92, 489-90, 818).

18. Chief Gallant's procedure of selecting the highest ranked individual is based on his belief that, as a practical matter, if not a legal matter, he is required to promote in rank order absent an ability to prove that the highest ranked individual of either race is unqualified for the promotional position (Gallant dep. 140-41, 329-40). Gallant bases his belief on experience (*id.*, 327) the strong civil service system (*id.*, 480, 633-34, 813-14), the expectation of administrative appeals and/or lawsuits by a passed over candidate (*id.*, 635-36), morale (*id.*, 894), long-standing custom and tradition (*id.*, 339, 634), and his inability to make comparison of qualifications (*id.*, 498).

19. In Chief Gallant's view, the Board certifies the candidates as qualified for promotion, and he must assume the Board is correct unless he can prove otherwise (*id.*, 140-41, 894).

20. Gallant does not base his practice of following rank order on any belief that the Board's certification procedure is effective in ranking candidates according to relative abilities. He has no knowledge of whether the Board examination tests the knowledge necessary for promotion (Gallant dep. 219), and he does not believe the highest ranked candidates are the best qualified (*id.*, 659, 871). He does not believe the Board's procedure is the best possible system (*id.*, 236).

21. Neither Chief Gallant nor Chief Laughlin are aware of any meaningful, job related method by which to compare the relative qualifications of candidates for promotion (*id.*, 498; Laughlin dep. 137, 190, 298, 300). Laughlin is not aware of any way in which to quantify the value of diverse or competing varieties of experience (Laughlin dep. 156, 450, 672).

22. Gallant would, however, reject any candidate he could show is unqualified (*id.*, 476) and has in fact rejected a

black firefighter certified for promotion to Fire Lieutenant (*id.*, ____).

23. The United States (and, apparently, the individual plaintiffs) have suggested that the following criteria could and should have been considered by Chief Gallant to compare the qualifications for promotion of the individual plaintiffs to the promoted blacks: 1) the raw, converted, and final scores achieved on the Board administered promotional exam, together with the rank of the individual on the "eligible register"; 2) the BFRS seniority (length of service on the department) of each candidate for promotion; 3) the highest formal station assignment held by a candidate; 4) whether a candidate has been "certified" by the BFRS as a driver or assistant driver of an apparatus; 5) the number of months each candidate served as a leadworker or medic; 6) the number of shifts served by an individual as an acting officer; 7) any educational pay incentive received by the individual; and 8) other firefighting experience (aside from that gained in the BFRS) (*See*, Exhibits 139-159).

Test Score and Rank

24. Under state law, the Board has the authority and duty to "certify" candidates to the City for all positions, entry level or promotional, in the Classified Service (Enabling Act, § 16).

25. In fulfilling this obligation, the Board administers written examinations. The Board then grades the examinations, first determining a "raw score," or simply the number of questions an individual answers correctly. The Board then sets a passing point and calculates a "converted score" on a scale of seventy (70) to one hundred (100), for those who passed the exam. A "final score" is determined by adding to the converted score one point for each year of service in the classified service in the City up to twenty (20) years. Finally, the Board ranks the candidates on an "eligible register" based on the final scores.

26. Plaintiffs contend that the City should have considered test and rank information in comparing candidates for promotion. The City and Defendant-Intervenors respond that,

assuming a duty to compare qualifications, the information was not reliably available to the City, nor was information necessary to enable the City to determine the significance of any differences in test scores. (The issue of the validity, *vel non*, of the examinations has been severed. In light of the Court's disposition of the case, that issue need not be reached.)

27. When a department has promotional vacancies, it prepares a "request for certification" of promotional candidates. (Graham 1985 dep. 159). Prior to forwarding the request to the Personnel Board, the City Office of Personnel reviews the Request for Certification to determine, *inter alia*, whether the department is in compliance with its affirmative action plan. If not, a notation is stamped on the request, indicating that the City requests that qualified blacks and/or females be certified. (Graham 1985 dep. 161-162). The City then receives a certification of the names of individuals eligible for promotion. Prior to the entry of the Decree, the City received a number of names equal to the number of vacancies plus two additional names ("Rule of 3"). (Graham 1985 dep. 169). Since the entry of the City Decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, plus the names of a sufficient number of black individuals to enable the City to meet its City Decree goals. (Graham 1985 dep. 170-171).

28. The Board forwards the certification to the City Office of Personnel which, after reviewing the certification to determine that a sufficient number of names have been identified, forwards the certificate to the department. (Graham 1985 dep. 180-81).

29. The department head selects a candidate from the certification and submits a recommendation for the Mayor's approval. (Graham 1985 dep. 180-81).

30. The only entity which can verify test score and ranking data is the Personnel Board. (Graham 1985 dep. 223-24).

31. The Certification contains only a list of names, with no reference to any score or rank (the rank of white individuals can be inferred, at least initially, by the order in which they are

certified; the rank of selectively certified blacks is not reflected, nor can it be ascertained from the face of the certification.) (Paragraph 5 Supplemental Affidavit of Gordon Graham, U.S. Exhibit 5 to Gordon Graham 1985 Dep).

32. The City has never received test score information from the Board and has never relied on test scores in making promotions (except for a single interval, the circumstances surrounding which render it irrelevant to the instant controversy). (Graham 1985 dep. 229-231; Arrington dep. 111, 113); *In re: Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Emp. Proc. [sic] Cas. 1, 6 n. 15.

33. The Board Rules and Regulations provide that test scores are confidential by reason of public policy. (PX2, Board Rule 1.11).

34. The testimony concerning whether the Board would have provided test scores to the City had the City requested was inconclusive. The Court concludes that plaintiffs have not demonstrated that the test scores were available to the City from the Board. (Arrington dep. 111, 113).

35. Plaintiffs contend that the City could have acquired rank and test score information from "informal lists", reflecting rank and test score information, created by individual promotional candidates and frequently posted, as a matter of general interest, at the stations (Tr. 851). The lists do not include descriptive statistics, such as standard error of measurement (Tr. 119, 851, 1024-25).

36. The informal lists are created through a "grapevine" process of calling various test-takers to ascertain their rank (and sometimes score) as well as the rank of any other individuals of which they may claim knowledge (Tr. 1024).

37. The informal lists are rarely complete beyond the first ten (10) to fifteen (15) positions (if complete to that point), and reflect the scores of between zero and fifty (50%) percent of the individuals listed. (Tr. 851, 1025).

38. The City considers efforts by the City employees to compile score and ranking data unreliable. (Graham 1985 dep. 223).

39. Due to problems with clerical errors, the City does not consider the Personnel Board card sent to examinees to be a reliable source of score and rank information. (Graham 1985 dep. 224).

40. The lists are generally, though not entirely, accurate with respect to the rank of the top ten (10) to fifteen (15) individuals, where listed, but are not as accurate with regard to the test scores listed, if any. (See exhibits 162-165; stipulation).

41. The Court concludes that the informal lists do not provide sufficiently complete or reliable information to enable the City to make any meaningful judgment regarding relative qualifications of promotional candidates.

42. The plaintiffs also contend that the City could have acquired test score information from the Board Consent Decree reports filed with the Court. Comparison of the filing dates of the Board's report with dates of promotions reveals that Woodrow Laster was the only black whose score could have been ascertained prior to his promotion and the Court had previously determined that Mr. Laster was promotable at a hearing on April 23, 1982. Moreover, there is no evidence suggesting that these reports were contemplated as a source of test score data and were not, under the terms of the Personnel Board Consent Decree, required to be furnished to the City.

43. Dr. Bernard Siskin is an expert qualified to testify concerning statistics. (Tr. 753-54).

44. Dr. Siskin analyzed the probability that the difference between two individuals' test scores would be as observed if their true test scores were a given number of standard errors of measurement ("SEMs") apart. (Tr. 756-57; 762-68).

45. Dr. Siskin's analysis does not show whether the Personnel Board's examinations are job related or valid. (Tr. 773-74; 793-94).

46. Dr. Siskin compared the test scores of selected (*i.e.* promoted) blacks with the test scores of certain non-selected (*i.e.* non-promoted) whites. He used test scores from the 1982,

1983 and 1984 fire lieutenant's exam and for the 1983 fire captain's exam. (Tr. 755; PX 23; PX 101).

47. Dr. Siskin concluded that, at the .05 level of significance, several non-selected white's true test scores were 4 or more SEMs apart. (Tr. 768-71; PX 101).

48. The SEMs used by Dr. Siskin for the examinations he considered had been calculated by the Personnel Board and provided to him by counsel for the United States. (Tr. 771-778; PX 23). The SEMs had been calculated based on the Kuder-Richardson 20 reliability coefficient ("KR20"). (Tr. 787). He used raw examination scores, (Tr. 754-55), and, given the data he had, converted scores could not be used. (Tr. 772). However, he testified that he did not believe that there would be much difference in the results if converted scores were used rather than raw scores. (Tr. 773).

49. If the City had had all of the converted scores for a particular examination, it could calculate the standard deviation. (Tr. 781). The reliability coefficient which he used for raw scores could reasonably be used to calculate the SEMs for converted scores. (Tr. 782).

50. To calculate the SEMs, the City would have had to have the reliability coefficient and the standard deviation of the test being considered. (Tr. 783).

51. To calculate the standard deviation, the City would have had to have all of the examinees' scores on a particular examination. (Tr. 785-86).

52. To calculate the KR20, the reliability coefficient Dr. Siskin used, the City would have had to have the number of correct responses given to each question on the exam. (Tr. 786). Without the pass/fail rates for any of the questions, the KR20 could not have been determined. (Tr. 786-88).

53. Dr. Siskin's analysis could not have been done by the City if the only information available to the City were the informal lists of examinee's ranks and scores reflected in PX 162, PX 163, PX 164 and PX 165. (Tr. 788-90). There is no evidence that any of the informal lists contained enough information to conduct Dr. Siskin's analysis.

54. The Court concludes that the City had no source from which it could reliably obtain sufficient information to consider in any manner on the rank or test score of a candidate on a promotional exam in comparing competing candidates. The City officials making (or recommending) candidates for promotions did not on any occasion have sufficient reliable information about the test scores and about the significance of the differences in these scores to have been justified in not promoting a minority candidate. *See, In Re: Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. 1, 7 (N.D. Ala. 1985).

BFRS Seniority

55. Plaintiffs appear to rely on seniority as a proxy of sorts for experience gained in the BFRS. It is basically agreed that experience as a firefighter with the BFRS is valuable in terms of performing the duties of lieutenant or captain. However, the amount of experience necessary or desirable, a manner in which to quantify experience for purposes of comparing the experience of the individuals, and the relationship of years of service to experience gained appears to be largely matters of personal opinion.

56. Several witnesses, including a Battalion Chief, take the view that the quality and quantity of experience gained in a given amount of time varies widely depending on the activity of a station and the general nature of the emergencies in its territory (e.g. industrial or commercial firefighting versus residential firefighting) (Tr. 79, 103-04). Other witnesses, including a Battalion Chief, testified that the station assignment is of little significance. (Tr. 178). Yet other witnesses fall between the two extremes, agreeing that station assignment can make a difference, but assigning varying degrees of significance to that difference.

57. No witness was able to state a manner in which the difference in experience could be meaningfully measured or quantified in any fashion (Tr. 103), much less one that would reasonably measure the job relatedness of that criterion. To the contrary, those questioned on the matter professed an inability to quantify or compare experience. The Court thus finds it unnecessary to adopt any opinion as to the degree to which ex-

perience may vary, due to the Court's finding that experience cannot be measured or compared for purposes of predicting job performance as lieutenant or captain.

58. It appears clear that experience does vary to some undetermined and undeterminable extent from station to station, and hence the Court concludes that time in service is not a reliable or uniform measure of experience.*

59. Most importantly, there is no evidence demonstrating a relationship between BFRS seniority and job performance as an officer.

60. Additionally, the first black was not hired on the department until 1968 (PX 27, Tr. Bolin, 221), and only one additional black was hired prior to the initiation of the *Martin* suit in 1974. (Ex. 23). This underrepresentation has already been found by this Court to have resulted from discrimination against blacks. In light of the obvious adverse impact on blacks which results from considering seniority, together with the absence of any suggestion that seniority predicts job performance, the Court finds that seniority is not a factor which can be considered under the City Decree in selecting between black and white candidates.

Highest Formal Station Assignment

61. Within the general classification of firefighter, various positions exist. For example, on the engine, the positions from lowest to highest are plugman, back-up man, nozzleman/assistant driver, and driver (the driver is also frequently a "leadworker" position, recognized by the Board in the form of 5% premium pay — the leadworker position will be addressed separately, below).

* "[I]t could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion." *In re: Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. at 5 n.14.

62. The general rule, which appears to be followed the vast majority of the time, is that station positions are assigned based on station or department seniority. (Tr. 89-90). While there was testimony that the captain, who assigns positions, has the discretion to appoint a less senior firefighter to a position "above" a more senior firefighter (e.g. Tr. 290-91), that appears to occur very rarely, and then usually due only to the preference of the senior firefighter not to take the higher position.

63. The only case testified to in which a junior firefighter was assigned (in this case on a temporary basis) a station assignment above a more senior employee involved a junior white and senior black. (Tr. 456).

64. While there was testimony that the leadworker position provides valuable experience for the rank of lieutenant, there was no testimony suggesting that serving in one of the remaining positions, as opposed to another, had any bearing on the qualifications of an individual to serve as lieutenant or captain. (Tr. 108-109). The only testimony in that regard was from Battalion Chief Bolin, who stated that he "certainly wouldn't want to make a statement that a plugman wouldn't be eligible to be a lieutenant." (Tr. 106). While each position carries with it a specific responsibility upon arriving at a fire, the evidence reflects that once these responsibilities are fulfilled, every firefighter assists in any manner necessary or helpful at the fire scene.

65. Most significantly, there is no evidence that the specific position(s) held as firefighter are predictive of performance as lieutenant or captain.

66. Because there is no evidence that position assignment as a firefighter is predictive of performance as a lieutenant or captain, and because position assignment is tainted by reliance on seniority, the Court concludes that highest formal station assignment held is not a permissible criterion on which to base promotional decisions, particularly in light of the underlying intent of the City Decree.

Certification as Driver

67. The policy of the BFRS is to require that drivers and assistant drivers be "certified" as qualified to drive an apparatus by passing an "examination" of skills administered by Captain Smith (Tr. 188) at the drills and training field (Tr. 189). The BFRS prefers that anyone in a position which makes it likely that he or she will need to fill in as driver also be certified, though that is not always possible, and hence, not always the case. (Tr. 878).

68. In order to take the driver's test, an individual must successfully acquire a letter from his captain to Captain Smith, requesting that Smith administer the test and stating the Captain's belief that the individual is prepared for the test. (Tr. 878-79; Ex. 75). It is the obligation of the individual's officer to prepare him for the driver's exam (Tr. 214, 222) who hence bears partial responsibility for a firefighter's test result (Tr. 215). One of the blacks testified that the reason why he was not certified as a driver was that at his station only those one level below the driver could take the driver test.

69. The driver's exam is administered by Smith and includes the knowledge of the equipment and the apparatus, use of that equipment, hydraulics, and a road test. (Tr. 188-191) The individual is tested on the apparatus he usually rides. If he does not ride an engine, he is tested on the engine at his station as well (Tr. 191-92). A firefighter need pass the driver's test only once, regardless of whether he transfers to an apparatus on which he has never been tested (Tr. 213).

70. The test is oral, rather than written (Tr. 192), and there apparently exists no document reflecting the questions to be asked (Tr. 209). Though the test in each case seems to be fairly uniform and exhaustive, there are no guarantees of consistency (*see* Tr. 193). The grading also appears to be flexible (*see*, Tr. 210, 212).

71. The first black to pass the test was Leslie Garner, who did so in 1972 (Tr. 215-16). Only 16 blacks have since passed the driver's test (Tr. 216-218).

72. Records of those passing the test are forwarded to the Chief's office; records of those failing are not. (Tr. 200-201).

73. While Smith testified that the driver's test is job related to the job of driving a fire apparatus (Tr. 219), he testified only that the knowledge covered by the driver's test was "useful" to a fire lieutenant in the performance of his duties (Tr. 222).

74. The Court concludes that the right to take the test, the test itself, and the scoring thereof, involve too much latitude left to be exercised at the discretion of superior officers. This makes the criterion of certification as driver the kind which has been found to be particularly suspect as likely to be affected by the biases of the superior. Moreover, there is no evidence on which to base a finding that passage of the driver's test is predictive of performance as a lieutenant or captain. It is not a permissible criterion on which to base promotional decisions.

Months Served as Medic

75. A "medic" is a state licensed paramedic capable of performing advanced life support procedures. The training of a medic is extensive (Tr. 135-39), and in light of the fact that 60% (Tr. 140) of all the BFRS runs are for emergency medical service, it certainly appears to be valuable experience for an employee of the BFRS of any rank.

76. While there was testimony that being a medic was beneficial to a Lieutenant, there was also evidence that it should not be considered (Tr. 356), and there is no evidence suggesting that whatever benefit it confers can be quantified. (Tr. 824-25).

77. More significantly, there is no evidence showing that qualifying as a medic is predictive of job performance as a lieutenant or captain.

78. Moreover, the evidence reflects that blacks have been excluded from the opportunity to achieve medic status, except at their own time and expense, a burden not imposed on many of the white medics. (Tr. 100-01). The medic program was established in 1973. (Tr. 158). No black firefighters of

the BFRS were in either of the first two medic classes attended by employees of the BFRS (Tr. 161-162); the department paid the tuition for that training and allowed the selected employees to receive the training, in part, on company time (Tr. 163-64). Witnesses have been able to name only a few black paramedics out of 120 in the department as a whole. (*See*, Tr. 183). Whether this was based on the intentional exclusion of blacks from the medic program or, as is more likely, resulted from the earlier exclusion of blacks from the department as a whole is irrelevant. The fact remains that blacks as a group are substantially underrepresented in the medic ranks, a status which is likely to continue since the BFRS in 1982 stopped paying tuition and allowing time off for paramedic training. (Tr. 165). Reliance on medic status cannot be validated and is an impermissible criterion for comparing promotional qualifications.

(The Court notes that plaintiffs organized their criteria with months served as medic/months served as leadworker as one category and shifts served as acting officer as another. Because the evidence shows that the job of a medic is not comparable to the job of a leadworker, (Tr. 171), and further, that the value of leadworker experience, if any, is due to a leadworker's service as acting, the Court has rearranged plaintiffs' categories to conform to the evidence.)

Months Served as Leadworker and Shifts as Acting Officer

79. Leadworker status is the highest position which can be obtained by a firefighter in the BFRS. The position of leadworker carries with it responsibilities beyond those of other firefighters. (Tr. 67-68) A leadworker assists his Lieutenant in the performance of supervisory duties and can be called upon to serve as acting officer in the absence of the regularly assigned officer. (Tr. 67-68) An acting officer has the duties, responsibilities and privileges of an officer.

80. The evidence reflects the leadworker position can give a firefighter valuable experience for serving as an officer. (Tr. 67-68)

81. The leadworker position is generally assigned on the basis of station or BFRS seniority (usually station seniority). (Tr. 91, 94, 102, 148).

82. Assignment to leadworker is based on the discretion of the captain. In cases when the most senior firefighter is not promoted to leadworker, the captain chooses the leadworker based on his subjective opinion of who is most qualified. Criteria which are influenced by the subjective evaluations of supervisors are, obviously, in this context suspect.

83. However, the evidence does not support a conclusion that the mere fact of service as leadworker or acting officer predicts successful job performance as an officer. (*See*, Tr. 1021). While it is self-evident that leadworker and acting officer experience is valuable, and the record so reflects, there has been no testimony concluding that serving as leadworker or acting officer will necessarily make an individual a good officer. To the contrary, Battalion Chief Wood notes that the value of acting officer experience is determined by how well the individual performs as an acting officer. (Tr. 177). The mere fact of service does not reveal enough.

84. Additionally, as is the case with all criteria based substantially on seniority, blacks have been barred from meeting this proposed criterion. (Tr. 91). The testimony indicates that only one black has ever served as leadworker.

85. Due to the clear adverse impact on blacks and the absence of evidence that service as leadworker or acting officer will successfully predict job performance, leadworker and acting officer status are not permissible criteria on which to base promotional decisions.

Educational Pay Incentive

86. Pursuant to the Board rules, incentive pay is awarded for certain educational accomplishments. An individual who obtains an AAS degree in Fire Science (offered at Jefferson State Junior College) will receive a 5% pay increase. (Tr. 964, 984). An additional 5% may be obtained if an individual earns a four year degree in certain, specified fields (e.g., Business Administration). (Tr. 47).

87. The Fire Science Curriculum at Jefferson State consists of approximately twenty-six (26) courses, thirteen (13) fire related courses and thirteen (13) liberal arts courses. (Tr. 46).

88. As with the other criteria heretofore discussed, opinions as to the value of fire science course work cover a broad range. A Fire Science degree was considered highly significant by some witnesses, yet relatively unimportant to others. Those who thought it should be considered in promotional decisions were unable to assign a weight to its value relative to other criteria. Others thought it should not be considered at all in making promotional decisions.

89. More significantly, there was no evidence that lieutenants or captains with a Fire Science degree perform better than lieutenants or captains without such a degree, or that a Fire Science degree predicts to any demonstrable extent the performance of an individual as an officer. Having a Fire Science degree, hence, has not been shown to be a job related selection criterion.

90. As to credit for non-fire-related degrees, there has been little or no explanatory testimony that such a degree is related to the responsibilities of a fire officer. The Court finds that any possible connection is tenuous at best and whether a candidate has a liberal arts degree is not an appropriate measure of comparison.

Other Firefighting Experience

91. The testimony reflects that firefighting experience gained outside the BFRS may be helpful, but again may not. (Tr. 358, 386). It would certainly appear to depend on the extent and complexity of the prior experience, factors not taken into account by the United States. (See, Exhibits 139-159). It appears that the BFRS's extensive training subsumes all but extensive, sophisticated prior experience. (Tr. 748).

92. More importantly, there is no evidence demonstrating a relationship between outside firefighting experience and performance as a lieutenant or captain. It is not a job related selection criterion.

93. The Court finds that prior fire experience is not a permissible criterion on which to base promotional decisions in the Fire Department.

Selection Procedure

94. The United States and plaintiffs have suggested that the foregoing criteria should have been considered collectively to compare promotional candidates. The City and Defendant-Intervenors have responded, not unfairly, that the factors are a "hodge-podge" of unvalidated criteria.

95. Irrespective of the value of any individual criterion standing alone, the Court recognizes that there has been no testimony explaining, or even suggesting, how each of the criteria should or could have been weighed and evaluated against other criteria. Those who testified on the subject were unable to suggest an analysis; and the record reflects that each individual questioned had a different notion of whether, and to what degree, a particular factor was of significance or should be considered in making promotions.

96. While plaintiffs presented a great deal of evidence suggesting that meeting certain criteria could be useful to an officer, this Court has heard not an iota of evidence that officers who meet any or all of those criteria actually perform better as officers than those who do not. Plaintiffs, in short, have not presented evidence that their proposed criteria can be combined to create a job related selection procedure, *i.e.*, a method of evaluating candidates which will accurately predict their future performance as officers.

97. Therefore, the plaintiffs have not demonstrated that any of the individual plaintiffs, were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

Engineering Department

98. John Duncan recommends candidates for promotion in the Engineering Department. Because Duncan is personally familiar with most of the people in the Engineering Department, his promotional practice, both pre- and post-Decree, is to base his recommendation for promotion on his assessment of the job duties of the position in question, and his knowledge of the past experience, job performance and training of the candidates for promotion. (Duncan 1982 dep. 46-47; Duncan 1985 dep. 42).

Hobson Riley, Assistant City Engineer, assists Duncan in selecting candidates for promotion by interviewing the candidates and making recommendations to Duncan. (Duncan 1982 dep. 37). Of course, Duncan considered the requirements of the City Decree (*See*, Duncan 1982 dep. 95).

99. In Duncan's view, the Personnel Board determines whether an individual is qualified; Duncan also evaluates the individual and makes an independent determination. (Duncan 1982 dep. 83-84).

100. Neither Duncan nor Riley were aware of the test score or rank of Lucious Thomas prior to his promotion. (Riley dep. 99; Duncan 1982 dep. 104-05).

101. Riley and Duncan discussed the promotional list and recommended Lucious Thomas for the position of civil engineer based on the requirements of the City Decree. (Riley dep. 38; Duncan 1982 dep. 91-92).

102. Lucious Thomas was qualified for the civil engineer position (Duncan 1982 dep. 96; John Duncan 1985 dep. 98; Riley dep. 37-38).

103. The reasons Duncan considered Ware better qualified than Lucious Thomas were: his higher rank on the certification of eligibles, his seniority, the fact that his job performance was slightly better (Duncan 1985 dep. 114) (though he also testifies that they were "about equal" (*id.* 113)), and the fact that Mr. Thomas was black. (*id.* 191-92).

104. Duncan considered the fact that Ware was white to be a positive factor which would have supported the selection of Ware. (Duncan 1985 dep. 191-192)

105. Though Jack Dunlap, a former supervisor of Thomas, had certain criticisms of Thomas's past performance (Tr. 1162-63), Dunlap did not discuss these criticisms with Duncan prior to Thomas's promotion to civil engineer. (*Id.* 1176-77) Dunlap had also recommended Thomas for promotion to Chief of Party based on his job performance (Tr. 1176).

106. Duncan believes that Lucious Thomas was not demonstrably less qualified than Kenneth Ware (Duncan 1982

Dep. 97; Duncan 1985 Dep. 97-98, 113-114), and the Court so finds.

107. The promotion of Thomas was made pursuant to (Tr. 1112, 1114, 1167), and was required by the City Decree (1982 Duncan dep. 95, 97; 1985 Duncan Dep. 97-98, 113-114).

Involvement of City Administration and Promotions

108. Aside from the selection of department heads, the Mayor of the City of Birmingham and the Mayor's office have very little involvement in making promotional recommendations in the Engineering and Fire Department. (Deposition of Mayor Arrington at p. 104). Typically, the City's Office of Personnel reviews all personnel matters with the exception of Department head promotions without the involvement of the Mayor's Office. (Arrington Dep. 104; Graham 1985 Dep. 192).

109. The Mayor's view is that the certification of an individual for promotion by the Personnel Board creates a presumption that the individual is qualified. (Deposition of Richard Arrington at p. 94; pp. 38-39, 428-429, Gordon Graham 1985 Deposition). The information provided to the City by the Board relative to individuals' qualifications is scanty. The Mayor has never seen test scores of individuals certified as eligible for a position with the City of Birmingham — even of those candidates for department head positions (Deposition of Richard Arrington at p. 111), despite the Mayor's having requested the Personnel Board to allow him to see all the information that was available on candidates for the position of Police Chief. (Deposition of Richard Arrington at 113).

110. The Court finds that the City's ability to determine relative qualifications is hindered further by the Personnel Board policy against allowing the City to take further action that the Personnel Board deems to be "additional testing". The Personnel Board's refusal to allow the Mayor to establish a three-member committee of engineers to interview candidates for the position of City Engineer is an example of the limitations imposed by the Board on the City in making employment selections and promotions. (Deposition of Dr. Ed Lamonte at p. 94, 96-97; deposition of Richard Arrington at p. 172).

111. The Court finds further that the Mayor's involvement in reviewing promotions within the Fire Department and the Engineering Department of the City of Birmingham is so slight that it merits no further attention by this Court. (Deposition of Dr. Edward Lamonte at p. 27, p. 59; deposition of Richard Arrington at p. 104, p. 356).

112. Gordon Graham, the Chief Personnel Officer of the City of Birmingham, is responsible for directing the activities of the Office of Personnel which includes supervision of personnel records, affirmative action responsibilities, benefits administration, administering the occupational safety and health plan and labor relations. (p. 33 Gordon Graham 1982 Deposition). Pursuant to the Consent Decree, the Mayor further designated Mr. Graham as the City's Affirmative Action Officer. (p. 141 Gordon Graham 1985 Deposition).

113. When the City rejects a certified candidate on the basis that the individual is not qualified, the Personnel Board recertifies the rejected candidate. (p. 391-394 Gordon Graham 1985 deposition).

114. The only factors department heads are required to consider in making promotional recommendations are the individuals certified by the Personnel Board, the requirements of the Consent Decree and the City's preferential policy toward City residents. (p. 196 Graham 1985 Deposition)

115. All applicants certified by the Personnel Board are presumed qualified unless a candidate lacks some essential skill that the Personnel Board did not test. (p. 428-429 Gordon Graham 1985 deposition).

116. As Affirmative Action Officer of the City, Mr. Graham is responsible for reviewing, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented under the terms of the Consent Decree. (Paragraph 3 Supplemental Affidavit of Gordon Graham, U.S. Exhibit 5 to Graham 1985 dep.).

117. The City has no formal promotional criteria. Department heads have been instructed to recommend can-

didates who in their judgment are qualified. (Graham 1985 dep. 423-24).

118. On occasion, the Office of Personnel has accepted explanations of the failure to recommend a certified black or female pursuant to a determination by the department head that the female or black was less qualified. (Graham 1985 dep. 173-75).

119. If a department fails to recommend a certified black or female and the Consent Decree goals have not been met, when the Office of Personnel receives the recommendation from the department head he reviews the recommendation to determine if there was sufficient written justification for the failure to select a black or female. (Graham 1985 dep. 61-62, 100-101).

City Decree Interpretation

120. One purpose of the City Decree was to insure that any disadvantages to blacks and women that may have resulted from past discrimination against them are eliminated. City Decree at 2.

121. One purpose of the City Decree was to avoid the burdens and expense of litigation. City Decree at 2.

122. Paragraph 5 of the City Decree obligates the City to adopt as a long term goal the employment of blacks and women to each job classification in each department of the City in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

123. Paragraph 6 of the City Decree obligates the City to establish and attempt to achieve an annual goal of making probational appointments of blacks to vacancies in the position of Fire Lieutenant at a rate of 25% or at the rate of black representation among applicants, whichever is higher.

124. Paragraph 8 of the City Decree obligates the City to promote at least one black to the next two Captain vacancies in the Fire Department.

125. The goals referred to above and set out in paragraphs 5, 6 and 8 of the City Decree are expressly made subject to the availability of qualified black applicants; the aforementioned goals are not expressly made subject to the availability of black candidates who are not demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

126. The purpose of the aforementioned goals is to correct the effects of any underrepresentation of blacks and women in the City's work force.

127. Paragraph 10a of the City Decree obligates the City to request the Personnel Board to certify selectively to the City for appointment qualified blacks and females, whenever such action is necessary to enable the City to meet the aforementioned goals.

128. Paragraph 3 of the City Decree provides that "remedial actions and practices required by the terms of or permitted to effectuate and carry out the purposes of the Decree shall not be deemed discriminatory within the meaning of . . . the provisions of 42 U.S.C. § 2000e-2(h), (j)".

129. Paragraph 2 of the City Decree provides that nothing in the City Decree shall be interpreted as requiring the City to hire or promote a less qualified person in preference to a person who is "demonstrably better qualified based upon the results of a job related selection procedure".

130. The purpose of paragraph 2 was to relieve the City from liability under the Decree if, although otherwise required by the Decree, it should reject a minority candidate because the results of a job related selection procedure show that person to be demonstrably less qualified.

131. The hiring and promotion by the City of less qualified blacks in preference to competing white candidates who are demonstrably better qualified based upon the results of a job related selection procedure is permitted to effectuate and carry out the purposes of the Decree.

132. The City Decree authorizes the City, in order to meet the aforementioned goals, to hire and promote black can-

didates who are certified as qualified by the Personnel Board, even if such candidates are demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

133. The phrase "job related selection procedure", as used in paragraph 2 of the City Decree, means a selection procedure which is validated or capable of being validated.

134. The word "demonstrably", used in paragraph 2 of the City Decree, means both clearly and measurably.

135. A selection procedure which relies in whole or in part on subjective criteria is not a job related selection procedure within the meaning of paragraph 2 of the City Decree.

136. The use of a selection procedure which has a component that would perpetuate the effects of past discrimination would be contrary to the express purposes of the City Decree; such selection procedure is not a "job related selection procedure" within the meaning of paragraph 2.

137. The City Decree does not obligate the City to compare the relative qualifications of black and white candidates for promotion prior to hiring or promoting blacks.

138. The City Decree does not obligate the City to adopt a job related selection procedure.

139. The City Decree does not obligate the City to compare scores achieved on promotional examinations by black and white candidates prior to promoting blacks.

CONCLUSIONS OF LAW

140. The City Decree is lawful. It was approved by this Court in *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) and plaintiffs cannot collaterally attack the Decree's validity. See *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982); *Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Austin v. County of DeKalb*, 572 F. Supp. 479 (N.D. Ga. 1983). [Join Pretrial Memorandum of Defendants, the City of Birmingham, Richard Arrington, Jr., and Defendant-Intervenors, "Pretrial Mem.," at 65-68.] The United States has conceded it

is not attacking the Decree's lawfulness and as a signatory it cannot. City Decree ¶ 3. The only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). Furthermore, under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham. *United States v. Jefferson County*, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Palmer v. District Board of Trustees*, 748 F.2d 595 (11th Cir. 1984); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985). [Pretrial Mem. at 69-84]

141. The burden of proof is on plaintiffs. Once defendants show that promotions were made pursuant to a consent decree, the burden shifts to the plaintiffs to prove by a preponderance of the evidence either that the promotions were not undertaken to meet the goals of the decree or that the decree is invalid. *Palmer v. District Board*; *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Evidence that race was considered in an affirmative action context is not the equivalent of the finding of direct discrimination that shifts the burden of persuasion to the defendants. *Doughtery v. Barry*, 607 F. Supp. 1271 (D.D.C. 1985).

142. In light of the City Decree, plaintiffs cannot prevail if they do not establish that the City acted with unlawful discriminatory intent. That an action was taken pursuant to a valid affirmative action plan or consent decree is proof that it was not taken with the requisite discriminatory intent. *United States v. Jefferson County*, 720 F.2d at 1518; *Palmer v. District Board*, 748 F.2d at 601. [Pretrial Mem. at 22-25.]

143. "Job related selection procedure," as the term is used in paragraph two of the Decree, refers to a validated

employee selection procedure.** See *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). [Pretrial Mem. at 30-37.]

144. "Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employment goals only if such minority applicants are 'demonstrably' less qualified.***

145. The criteria upon which plaintiffs are relying to prove comparative qualifications have not been shown to be valid; furthermore, they are the kind of criteria that have been viewed suspiciously by courts because of their subjectivity and tendency to perpetuate the effects of past discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Miles v. M.N.C. Corp.*, 750 F.2d 867 (11th Cir. 1985); *Walker v. Jef-*

** Indeed, more than three years ago and only one year after entry of the City Decree, Mr. Fitzpatrick, counsel for the private plaintiffs, interpreted paragraph two to require a "validated" procedure:

"Whether the City uses [statistics pertaining to test scores] in making their decisions or not, we don't claim is relevant to the question of whether or not in fact one person possesses superior job related qualifications in accordance with a validating (sic) procedure and that is our interpretation and understanding of paragraph 2." (Emphasis added.)

B.A.C.E. v. Arrington, CV 82-P-1852-S, T.R.O. Hearing on September 21, 1982, Transcript at 49.

*** Of the common meanings of the word "demonstrably", the ones most suitable in this context are "obviously" or "clearly". *In re: Birmingham Employment Litigation*, 37 Fair Empl. Prac. Cas. 1, 6-7 (N.D. Ala. 1985).

Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984); *Ensley Branch, NAACP v. Seibels*, 616 F.2d 812 (5th Cir. 1980). [Pretrial Mem. at 37-46] Any selection procedure which utilizes subjective criteria or length of service — or other criteria which have been tainted by subjectivity or consideration of length of service — cannot be reconciled with the City Decree, which was expressly intended to ensure an end to discrimination against blacks, and to remedy any disadvantage to blacks resulting from past discrimination.

146. The hodge-podge of "criteria" proposed by plaintiffs do not constitute a selection procedure. No formula has been offered, let alone proven valid, to assess the relative importance of the "criteria" offered by the plaintiffs. The overall approach is wholly subjective and is as invalid as its individual components. [Pretrial Mem. at 46-47]

147. Paragraph two of the Decree does not require the City to develop or use a job related selection procedure. It gives the City a limited option and limited defense should the City fail to meet the Decree's goals. This conclusion is compelled by the Decree's language and purpose, and is supported by the pre-Decree practices of the City and the Personnel Board. [Pretrial Mem. at 47-57.]

148. Plaintiffs have not established that any of the white plaintiffs are demonstrably better qualified than any of the black promotees based on the results of a valid, job related selection procedure. The failure of plaintiffs to identify a selection procedure, let alone one that is valid and job related, compels that conclusion.

149. The City Decree and the affirmative action plan for the promotion of blacks it created, clearly contemplate the promotion of blacks who are demonstrably less qualified than competing whites. This conclusion is compelled by the wording and purposes of the Decree. *United States v. Jefferson County*, 28 Fair Emp. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981). The 1981 Statements of the parties to the Decree and the proceedings at the Fairness Hearing make clear that was also the contemporaneous understanding of the parties. *United States v. Jefferson County*, CA-75-P-0666-S, Fairness Hearing on August 2, 1981, Transcript at 63. [Pretrial Mem. at 8-21.]

150. The City Decree entered by this Court, immunizes the City from liability for actions taken pursuant to it. See City Decree, ¶ 3. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), recognizes that proposition. If there had been any doubt about that after *Jefferson County*, the Eleventh Circuit's subsequent decision in *Palmer v. District Board*, made clear that an action taken pursuant to a consent decree, not just one absolutely required by it, is not an act of discrimination under Title VII. [Defendants' Memorandum Addressed to the Burden of Proof and the "Mandated" Language in *Jefferson County*, "Burden of Proof Mem.," at 21-30.]

151. Race-conscious actions taken by an employer pursuant to a valid affirmative action plan are legal. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983); *Palmer v. District Board of Trustees*, 748 F.2d 595, 601 (11th Cir. 1984). [Pretrial Mem. at 22-25.]

152. The United States has consistently taken positions in this litigation inconsistent with positions it pressed so vigorously in the litigation leading up to this Consent Decree. It has repeatedly breached its obligations to uphold the Decree and this Court's instructions, *In Re: Birmingham Employment Litigation*, 37 Fair Emp. Prac. Cas. 1, 8 (1985), that it act in accord with its obligations under the Decree. Its actions in these proceedings have been tantamount to an attack on the Decree's validity.

Subsidiary Conclusions of Law

153. Information or opinions not known to the decision-maker are inadmissible as irrelevant.

154. Evidence of prior discrimination by the City of Birmingham is admissible to establish the factual basis for the legality of the City Decree, to show that seniority based criteria are subject as a result of prior underrepresentation, and that subjective criteria for evaluating promotions may be contemplated by the vestiges of such discrimination or the attitudes of those hired during such period.

155. Selection criteria which incorporate seniority or which are based on the subjective discretion or opinions of su-

pervisors may not be considered in comparing black and white candidates under paragraph two of the City Decree.

Respectfully Submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re:

BIRMINGHAM REVERSE
DISCRIMINATION
EMPLOYMENT LITIGATION

CIVIL ACTION NO.
CV 84-P-0903-S

ORDER AND PARTIAL FINAL JUDGMENT

1. In accord with the findings of fact and conclusions of law dictated and adopted in open court on December 20, 1985, the Court finds for the defendants and against the plaintiffs on the claims described in paragraphs 2 through 5, below.

2. The claims of plaintiffs Robert K. Wilks, Ronnie J. Chambers, Carlice E. Payne, John E. Garvich, Jr., Robert Bruce Millsap, James W. Henson, Howard E. Pope and Charles E. Carlin (originally brought in CV-83-P-2116-S) are DISMISSED with prejudice.

3. The claims of plaintiffs Floyd E. Click, James D. Morgan, Joel Alan Day, Gene E. Northington, Vincent Joseph Vella, and Lane L. Denard (originally brought in CV-82-P-850-S) are DISMISSED with prejudice.

4. The claims of plaintiffs Kenneth O. Ware and Birmingham Association of City employees (originally brought in CV-82-P-1852-S) are DISMISSED with prejudice.

5. The claims of plaintiff-intervenor United States of America, as originally brought in the Complaints in Intervention involving the City of Birmingham Fire and Rescue Service and the City of Birmingham Engineering Department (filed on Jan. 14, 1985 and May 17, 1985), are DISMISSED with prejudice.

6. Court costs are taxed against the private plaintiffs and the United States as the Court may subsequently allocate.

Defendants and Defendant-Intervenors are ordered to file their Bill of Costs by January 21, 1986.

7. All claims for attorneys fees in these cases under 42 U.S.C. § 1988 and Title VII of the Civil Rights Act of 1964, as amended, by the defendants and defendant-intervenors are DENIED.

8. This judgment does not affect the pending counterclaims against the United States in Civil Action Nos. CV-83-P-2116-S (*Wilks*); CV-82-P-850-S (*Bennett*); and CV-82-P-1852-S (*BACE*). Consistent with 28 U.S.C. §§ 2412(d)(1)(B) and 2412(d)(2)(G), this judgment does not affect the rights of the defendants to seek an award of costs and attorneys' fees against the United States under the Equal Access To Justice Act, 28 U.S.C. § 2412(d), as amended August 5, 1985, Public Law 99-80, §§ 2, 4-7, 99 Stat. 184-87, upon entry of a judgment in these cases that is final and not appealable.

9. Pursuant to Rule 54(b), Fed. R. Civ. P., the Court determines that there is no just reason for delay, and expressly directs that judgment be entered with respect to the claims and parties described in paragraphs 2, 3, 4, 5, 6 and 7 of this Order.

DONE and ORDERED on this the 23rd day of December, 1985.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

BIRMINGHAM REVERSE
DISCRIMINATION
EMPLOYMENT LITIGATION

CIVIL ACTION NO.
CV 84-P-0903-S

PLAINTIFFS' AND UNITED STATES' MOTION
TO AMEND JUDGMENT

Pursuant to Rule 59, Fed.R.Civ.P., plaintiffs and the United States move the Court to amend the judgment entered on December 26, 1985 in the following respects:

I. Additional Proposed Findings

As an aid to the appellate courts in resolving some of the issues which all parties naturally expect to be raised, movants request the following additional findings:

1. With the possible exception of Albert Isaac, the City has not identified any of the black promotees as individual victims of past discrimination. Promotee Albert Isaac was a recipient of backpay pursuant to the City Decree. Nor has any evidence been submitted indicating in fact that any other black promotee is an individual victim of past discrimination.

2. In the course of the promotional process, the City never considered or compared the qualifications of competing candidates for promotion in the BFRS (outside of the fact of certification from the Board).

3. Each of the plaintiffs is qualified for the promotion he claims was illegally denied to him.

4. But for their race, each of the plaintiffs would have been promoted to the position which he claims was illegally denied to him.

5. Had each plaintiff been black, he would have been promoted to the position which he claims was illegally denied to him.

6. None of the individual plaintiffs (nor their privies) are parties to the City Decree or the Board Decree.

7. But for the Board Decree and City Decree, none of the black promotees would have been certified for the promotions they ultimately received. (Miriam Hall depo.)

8. The certification of each of the black promotees was not required, permitted, or authorized by the Board's Enabling Act. (Miriam Hall depo.)

9. Richard Arrington, Jr. is the first black mayor of the City of Birmingham. There is strong pressure within the City's governmental structure to increase the percentage of black employees in promotional positions. Arrington is the direct supervisor of BFRS Chief Gallant and City Engineer Duncan. A majority of the citizens of Birmingham are black. Since his tenure as a City Councilman, Mayor Arrington has been an advocate of preferential treatment for blacks in City employment and the awarding of City contracts. (Arrington depo.)

10. The City does not use a job-related selection procedure in evaluating the qualifications of certified candidates or in comparing candidates' qualifications. The City has made no effort to develop or ascertain the cost of such a procedure. (Graham and Gallant depositions.)

11. Race was a significant factor in the decision of the City to promote each of the black promotees. (Gallant, Laughlin, and Duncan depositions. and Admissions)

12. The City has acknowledged its use of race in the promotional process.

13. The City's use of race in the promotional process has had a disproportionate impact on whites seeking promotion in the BFRS and to the position of Civil Engineer. (See PX 23 and Registers).

14. The City has not proven that any of the black promotees are not demonstrably less qualified than any of the passed-over whites according to the results of a job-related selection procedure.

15. The City made no judgment during the promotional process about the relative qualifications of the certified black and white BFRS promotional candidates. (Gallant and Laughlin depositions.)

16. On the occasions when blacks were promoted, the passed-over whites were not actively considered for the promotional jobs awarded to the certified blacks. (Laughlin depo.)

17. At the time the black promotees were promoted, the City did not determine that each black promotee was not demonstrably less qualified than any passed-over white.

18. Each of the passed-over whites had an expectation of promotion based on test scores and seniority.

19. In September 1981, 9.4% of the individuals in the classification of fire fighter were black. (DX 2218).

20. In March 1982, 10.54% of the individuals in the classification of fire fighter were black. (DX 2218).

21. In June 1983, 12.64% of the individuals in the classification of fire fighter were black. (DX 2218).

22. In March 1985, 12.98% of the persons in the classification of fire fighter were black.

II. Changes to Findings Proposed By Defendants

This is not intended to constitute an exhaustive analysis of the findings submitted by the defendants. The paragraphs are numbered in accord with the number of the proposed finding of the defendants.

10. The individual plaintiffs have never claimed that "all blacks promoted in the Engineering Department" are demonstrably less qualified. We suggest the words "and the Engineering Department" be struck and the words "and to the classification of Civil Engineer" be inserted after "BFRS".

13. There is no evidence in the record of this trial that "during the 1950's there was a period of time where blacks were not allowed to take the firefighter . . ." test. Mr. Pope, who is credited with submitting that evidence, testified he did not know that was a fact, but had heard that before.

15. It is incorrect to state that this finding is "uncontested." Movants suggest the words "race and sex" be substituted for "goals of the City Decree".

17. The words "as appropriate under the City Decree" are not clear.

19. Movants request these words be added to this finding: "At least one other City department head (the Police Chief) does not assume all certified promotional candidates are qualified and has instituted a Promotional Review Board which is expected to make an independent assessment of qualifications."

30. Movants suggest the following addition: "Test-takers receive a card from the Board with their rank and final score. Test-takers are not prohibited from revealing that information and, in fact, routinely reveal test results to their peers."

34. Add: "The City has never requested testing information from the Board."

35. Add: "BFRS Battalion Chiefs make daily rounds at each station, and sometimes review posted 'informal lists'. Information contained on the informal lists is sometimes shared with Chief Gallant and Chief Laughlin on an informal basis."

37. Add: "Information concerning the scores and ranks of persons ranked below #15 is sometimes contained on informal lists. The ranks of some of the black promotees were included on some informal lists received as exhibits."

38. Change "The City" to "The City Personnel Director/Affirmative Action Officer."

39. Change "the City" to "The City Personnel Director/Affirmative Action Officer". Add: "No evidence of any

clerical errors in the preparation of the Personnel Board card was submitted."

42. Add: "In addition to Woodrow Laster, the test score information concerning the 1984 promotional examination was available at the time Albert Isaac, Eugene Baldwin, Jackie Barton, Calvin Echols and Benjamin Garrett were promoted." (By comparing the certification with the Register tendered in the Compliance Report, it would be a simple process to ascertain the scores and ranks of these individuals.)

47. Add: "Dr. Siskin testified that, at the .05 level of significance, any difference of at least 2 SEMs in observed test scores is highly statistically significant."

94. Add: "The United States' proposed use of these criteria would not result in adverse impact against certified blacks."

112. Add: "Graham reviews all departmental promotional recommendations, affirmative action forms and affirmative action plans. The Affirmative Action Officer signs the Mayor's name to departmental promotional recommendations. Graham's office reviews all communications and other transactions between City department heads and the Personnel Board.

113. This is obviously not always true. For example, the City's rejection of some Police Chief candidates was accepted by the Board.

128. This is an incorrect quotation of paragraph 3. Add a comma after "terms of" and modify this clause as follows: "purposes of, this Consent Decree."

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re:

BIRMINGHAM REVERSE
DISCRIMINATION
EMPLOYMENT LITIGATION

CIVIL ACTION NO.
CV 84-P-0903-S

ORDER

Upon consideration of the Motion to Amend filed by the plaintiffs and the United States on December 26, 1985, it is ORDERED as follows:

A. The court adopts as additional findings of fact the following numbered paragraphs listed in part I (Additional Proposed Findings) of said motion: #1, #2, #3, #4, #5, #6, #7, #10, #15, #19, #20, #21, #22.

B. The court amends its findings of fact as previously adopted from the proposed findings of fact submitted by the defendants to read as follows (substituted or added language being underlined):

10. The individual plaintiffs contend that all blacks promoted in the *BFRS and to the classification of Civil Engineer* since the entry of the City decree are demonstrably less qualified than the white plaintiffs; the United States contends that only some of the white plaintiffs are demonstrably better qualified than some of the black promotees. Additionally, both the individual plaintiffs and the United States contend that some of the black promotees were unqualified for promotion at the time of their promotion.

15. *The City in its Engineering Department and the BFRS* has followed the same general promotional practices since entry of the City Decree as were in place before the entry of the City Decree, the only material difference being that the City now considers the goals of the City Decree in making promotional decisions.

33. The Board Rules and Regulations provide that test scores are confidential by reason of public policy. *Test-takers, however, receive a card from the Board indicating their rank and final composite score; and many test-takers reveal such information to their peers.*

34. The testimony concerning whether the Board would have provided test scores to the City has the City requested *them* was inconclusive. *Although the City never requested testing information from the Board, the Court concludes that the test scores were not available to the City from the Board.*

36. The informal lists are created through a "grapevine" process of calling various test-takers to ascertain their rank (and sometimes score) as well as the rank of any other individuals of which they may claim knowledge. *BFRS Battalion Chiefs make daily rounds at each station and sometimes look at these informal lists. Some of the information contained on the informal lists has occasionally been shared with Chief Gallant or Chief Laughlin on an informal basis.*

37. The informal lists are rarely complete beyond the first ten (10) to fifteen (15) positions (if complete to that point), and reflect the scores of between zero and fifty percent (50%) of the individuals listed. *Information concerning the rank (and perhaps the score) of persons ranked below position #15 is sometimes contained on the lists, and some of the informal lists received as exhibits reflected the rank of some of the black promotees.*

113. When the City rejects a certified candidate on the basis that the individual is not qualified, the Personnel Board *ordinarily* recertifies the rejected candidate.

C. In other respects, the motion of the plaintiffs and the United States is denied.

This the 6th day of January, 1986.

/s/ Sam C. Pointer, Jr.

United States District Judge

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: The Court will now dictate its findings of fact and conclusions of law. These findings of fact are based upon the evidence that has been presented over the past four and a half days, consisting of the testimony of various witnesses and the reception into evidence of voluminous documents.

I state at the outset that the conclusion that I reach is to be favorable to the defendants.

Basically the issue, the legal issue, which, as I view it, is determinative of this case is one that was stated in an order entered back in February of this year.

The conclusions there expressed either explicitly or implicitly were that under appropriate circumstances, a valid consent decree appropriately limited can be the basis for a defense against a charge of discrimination, even in the situation in which it is clear that the defendant to the litigation did act in a racially conscious manner.

In that February order, it was my view as expressed then, that if the City of Birmingham made promotions of blacks to positions as fire lieutenant, fire captain and civil engineer, because the City believed it was required to do so by the consent decree, and if in fact the City was required to do so by the Consent Decree, then they would not be guilty of racial discrimination, either under Title 7, Section 1981, 1983 or the 14th Amendment. That remains my conclusion given the state of the law as I understand it.

Counsel have amply noted that the law is not clear, however, in this regard. And that this decision is being made at a time when there is uncertainty as to the state of the law.

In the effort to determine what the state of the law is, as best I can determine it, I have considered no single decision. As I evaluate the decisions particularly out of the Supreme Court, it becomes apparent to me that if you look at any one given decision, you can come up with a conclusion as to what

the law is which is different from the decision you reach if you look at some other decision. And is required as a result somehow attempting to synthesize what I view to be a development in the law as yet not fully and finally defined.

Much argument has been made as this case came to trial about the burden of proof. I declined in advance of trial to rule definitively on certain hypothetical issues, because I wish to see the state of the evidence as it was presented. I am persuaded that at least in that respect my earlier decision was proper. Because it has become clear to me from the evidence in this case that it is not necessary for the Court to determine whether some action apparently permitted by the consent decree but not mandated by it would be protected against claims of discrimination.

In this case, under the evidence as presented here, I find that even if the burden of proof be placed on the defendants, they have carried that proof and that burden of establishing that the promotions of the black individuals in this case were in fact required by the terms of the consent decree.

I reach that decision on the basis that the language that has become the focus of these proceedings, namely language in paragraph two of the consent decree, would require or would allow an exception to the goals otherwise stated for the City in other provisions of the decree only if the decision-makers at the time of making the decision had information demonstrating that a black, although qualified, was demonstrably less qualified than a white on the basis of a job-related selection device.

During the presentation of evidence here, the only possible job-related selection device that has been presented is that of the test that the Personnel Board uses. Many other criterion have been selected, none have been in any way indicated or demonstrated as being job related. Job related in this sense must be addressed in the context of the regulations under Title 7, which were in force at the time the consent decree was adopted, and indeed continued in force.

In this particular case, the tests used by the Personnel Board have simply been assumed to be valid, that is, job related. However, the evidence demonstrates that the decision-makers on the part of the City did not have the information

available to them on which they could have made any kind of judgment that the blacks scoring lower on those exams scored sufficiently lower to be demonstrably less qualified than the whites who were higher ranked.

I had anticipated until this morning that at the conclusion of the case and while still attending to the case I would attempt at the conclusion of the case to dictate findings of fact in my normal manner. That is, I had anticipated that I would simply from my own memory and recollection go through the various items of evidence and make the appropriate findings with respect to the variety of issues and persons involved.

I am varying from that today in doing something that I have done only once before that I can recall. The reason for doing so is that I have received this morning some findings of fact proposed by the defendants that I find to be ninety-eight percent objective, fair and the same findings I would make.

The appellate decisions have cautioned trial courts against simply adopting proposed findings submitted by parties. I am aware of that admonition. I have, however, gone through these proposed findings and will in just a few minutes indicate certain changes that I would make in them. To the extent I do not make changes, I adopt them as my own individual findings. This is both as to findings of fact and conclusions of law. There are in addition a few facts not contained in the findings of fact proposed by the defendants that I will recite as findings of fact by the Court.

First, I will attend to several matters that were not covered by the defendants' proposed findings of fact. Each of the plaintiffs who complains in this litigation against the failure to be appointed as a fire lieutenant or fire captain or civil engineer or who claims that he was delayed in such an appointment was adversely affected because he was white. Those persons in the absence of the consent decree and in the absence of any affirmative action plan adopted by the City as mandated by the decree would, as I interpret the evidence, have been appointed to the positions they desired and about which they here complain. Each of those individuals ranked higher on the certification list

provided by the Personnel Board than the blacks who were appointed by the City pursuant to the consent decree.

Most but not all of those whites who were not selected for those positions had higher test scores on the test administered by the Personnel Board. Although the scores, as I have already indicated, were not known by the decision-makers at least with a sufficient degree of accuracy and completeness to make any judgment concerning the significance of those differences.

Several of the whites who were unsuccessful in their promotional efforts or who were delayed in those promotional efforts not only had higher test scores than the blacks who were selected but had scores which were sufficiently higher on the test that using the techniques of statistical inference would have indicated that the true test score of the white was statistically significantly greater than the true test score of the black. I state that that is true for some of the whites involved but certainly not all.

I make particular mention, although it is contained in the proposed findings of fact submitted by the defendants, that the practice of the fire department both before and after the consent decree was to not consider qualifications in making promotions but instead is to follow willfully the certification list submitted by the Personnel Board, simply selecting the higher ranked person, whether qualified or not.

Only since the consent decree has that been changed one occasion, and that was at a time at deciding that a black who otherwise would have mandated for promotion under the decree was not qualified. This Court upheld the decision by the City had under the particular facts of that case and that situation the black was not qualified.

With respect to the vacancy in the engineering office, the Court makes the following conditional matters that is perhaps not that explicit in the proposed findings submitted by the defendant. The white who would have been appointed to the position of civil engineer and who certainly was qualified for that position did score higher on the test than did the black who was selected. He, I am referring to Mr. Ware, is the individual who would have been selected by the chief engineer for that position

had it not been for the consent decree. In noting, however, that the rankings and test scores coming from the Personnel Board were not in the engineering department deemed to be particularly valuable or useful, the chief engineer would have selected that individual Mr. Ware, even though he scored much lower than another white individual, that is the difference between his score and another white was even greater than the difference between Mr. Ware's score and the black.

Furthermore, the chief engineer in his deposition testimony indicated candidly that he considered the race of Mr. Thomas, person ultimately chosen, being black, as a negative feature. And that he would have so considered that as a negative feature, but for the fact that the consent decree required him to look otherwise at the candidate. He also noted in his deposition that although he would have preferred because of his view of the experience factor and certain other characteristics, the appointment of Mr. Ware, he could not say that Mr. Ware was to any significant degree better qualified than the person he chose, namely the black Mr. Thomas.

Now, with those additional matters being recited as findings of the Court, I will go through the proposed findings of fact submitted by the defendants and make certain revisions.

[The Court then made the revisions, which have been incorporated into the findings below, together with modifications proposed by plaintiffs and adopted by the Court.]

These findings and conclusions are entered at this time along with the findings and conclusions indicated at the outset of this recitation.

Entry of judgment should not be delayed or deferred. However, I am going to call upon counsel to submit to me on Monday an appropriate form of judgment that simply indicates that in accordance with the findings and conclusions dictated or incorporated by the Court in its oral charge that certain cases or claims are dismissed and directing under Rule 54-B that those findings and resolutions be made final.

I say that I ask this because there is some difficulty — I believe this case fully disposes of or resolves at the trial level

the Bennett decision. But I don't believe that is so with respect to the case in which Mr. Ware had his claims, or at least I am not sure it does, and so there would have to be a 54-B finding in that case. Also since these cases were a part of a larger group of cases consolidated under the name Birmingham Reverse Employment Discrimination Case, it is for safety's sake appropriate to use 54-B to make sure that there is no question as to finality by virtue of those other cases not having been resolved at this time.

It is for that reason that I call upon counsel to make some analysis to present me with an appropriate one-page order is all it requires which clarifies which cases are due to be resolved as a result of this decision favorable to the defendants.

Cost but no attorneys' fees are taxed against the plaintiffs in this case. It is clear that there is sufficient merit in these case to justify the pursuit of them. I say that both on a subjective and objective basis and that claims by a prevailing defendant under the Christian, Burg, Garment case would not justify an award of attorneys' fees against the plaintiffs even though the defendants have prevailed. There may be some question as to whether some change in the standards when you are talking about a reverse discrimination case, but at the present time I am persuaded that Christian, Burg, Garment is the applicable standard to be applied here, even though the — with the defendants having prevailed.

FINDINGS OF FACT

1. The individual plaintiffs are white males, employed by the City of Birmingham in its Engineering Department or the Birmingham Fire and Rescue Service ("BFRS"), who contend that they have been unlawfully denied promotions on the basis of their race.

2. Also a plaintiff is the United States Department of Justice, an intervenor on the side of the plaintiffs. ("Plaintiffs" will hereafter refer to the individual plaintiffs and the United States collectively. When collective use is inappropriate, the Court will refer to "individual plaintiffs" and "United States" or "government".)

3. Defendants Richard Arrington, Jr., and the City of Birmingham (collectively the "City") admit that the Engineering Department and the BFRS have considered race in making promotions, but deny discriminatory intent, and proffer as their legitimate, non-discriminatory motive compliance with a Consent Decree entered in *United States v. Jefferson County*, 28 FEP Cases 1834 (N.D. Al. 1981) (the "City Decree"); discussed more fully below.

4. Defendant-intervenors represent the interests of the original black plaintiffs ("Martin plaintiffs") in *Martin v. the City of Birmingham*, as well as those of the beneficiaries of the relief won by the *Martin* plaintiffs and their certified classes. They join in the City's defense that the preferential promotion of blacks was legal pursuant to the City Decree.

5. On August 21, 1981, this Court entered an Order in *United States v. Jefferson County* approving as fair two consent decrees; one (heretofore designated as the "City Decree") between the City, the *Martin* plaintiffs, and the United States, executed May 19, 1981; and one between the Jefferson County Personnel Board (the "Board"), the *Martin* plaintiffs, and the United States (the "Board Decree"), also executed May 19, 1981.

6. Resolution 547-81 authorized the Mayor to enter into the City Decree.

7. The decrees generally required the City to attempt to meet certain long term and short term goals set forth in the City Decree, and the Board to "certify" to the City (as required by Alabama law under the Civil Service System ("Enabling Act")) sufficient numbers of black applicants to enable the City to meet its goals.

8. The individual plaintiffs contend that the City Decree is illegal and does not relieve the City from liability to whites who were "passed over" for promotion on account of their race. The government does not join the individual plaintiffs in their contention that the Decree is unlawful.

9. The individual plaintiffs and the government both contend that the City has exceeded the requirements of the City

Decree and is hence not protected thereby. That argument consists of two necessary premises: that only employment decisions "mandated" in the sense of being required by the City Decree can provide the City with immunity for its race-conscious promotions; *and* that the City Decree does not *require* the promotion of less qualified blacks over demonstrably better qualified whites. The latter contention is grounded on ¶ 2 of the City Decree, which provides, in relevant part, that the City is not required to promote a less qualified black in preference to a demonstrably better qualified white, as determined by the results of a job related selection procedure. They thus contend that the promotion of a demonstrably less qualified black is not protected by the City Decree.

10. The individual plaintiffs contend that all blacks promoted in the BFRS and to the classification of Civil Engineer since the entry of the City Decree are demonstrably less qualified than the white plaintiffs; the United States contends that only some of the white plaintiffs are demonstrably better qualified than some of the black promotees. Additionally, both the individual plaintiffs and the United States contend that some of the black promotees were unqualified for promotion at the time of their promotion.

11. In response, the City and Defendant-Intervenors contend that any action contemplated by, or made as a direct consequence of, the City Decree is lawful, and that the promotion of qualified, but demonstrably less qualified, blacks is contemplated and permitted by the City Decree. They further contend that in order to meet the goals provisions of the City Decree, the City is required to promote any black individual whom the City could not prove to be demonstrably less qualified according to the results of a job related, validated, selection procedure. Finally, the City and defendant-intervenors contend that, in any event, none of the blacks promoted are unqualified, or demonstrably less qualified, according to the results of job related selection procedure.

12. In *United States v. Jefferson County, supra*, this Court found the City and Board Decrees to be warranted by the evidence of discrimination by the City, based on the factors set forth in *United States v. Alexandria*, 614 F.2d 1358 (5th Cir.

1980), and the other applicable decisions of the several courts of appeals. Plaintiffs have demonstrated no facts demonstrating that the previous conclusion of the Court was in any way in error.

13. To the contrary, the employment statistics reflect that blacks were seriously underrepresented in City employment, specifically in the Engineering Department and BFRS, at the time the City Decree was entered (during the 1950's, there was a period of time where blacks were not allowed to take the firefighter or the civil engineer examinations), and similar underrepresentation continues even with the actions taken under the consent decree to this day.

14. Nor are the interest of whites trammled by the Decree. Since the entry of the Decree, some have been promoted immediately upon certification, others after only a delay, and those not promoted have had or will have an opportunity to compete as each new exam is given and an eligible register (which is valid for only a year) is created.

15. The City in its Engineering Department and the BFRS has followed the same general promotional practices since the entry of the City Decree as were in place before the entry of the City Decree, the only material difference being that the City now considers the goals of the City Decree in making promotional decisions.

16. In the BFRS, it was Chief Gallant's pre-City Decree practice to review the personnel file of the certified individuals, consult with Deputy Chief Laughlin, consider any other information he had received concerning the "certified eligibles" (although he did not actively seek such information), and promote the eligibles in the order in which they appeared on the certification, absent a reason to believe they were not qualified to perform the duties of the position for which they were being considered. The Chief made no effort to compare the qualifications of the certified individuals; the only decisions he made were whether he could prove that they were not qualified.

17. The general procedure Gallant followed before the entry of the City Decree has not changed. The only material change in Chief Gallant's procedure since the entry of the

Decree is that he now alternates between blacks and whites, selecting in each case the highest ranked white or black, as appropriate under the City Decree.

18. Chief Gallant's procedure of selecting the highest ranked individual is based on his belief that, as a practical matter, if not a legal matter, he is required to promote in rank order absent an ability to prove that the highest ranked individual of either race is unqualified for the promotional position. Gallant bases his belief on experience, the strong civil service system, the expectation of administrative appeals and/or lawsuits by a passed over candidate, morale long-standing custom and tradition, and his inability to make comparison of qualifications.

19. In Chief Gallant's view, the Board certifies the candidates as qualified for promotion, and he must assume the Board is correct unless he can prove otherwise.

20. Gallant does not base his practice of following rank order on any belief that the Board's certification procedure is effective in ranking candidates according to relative abilities. He has no knowledge of whether the Board examination tests the knowledge necessary for promotion, and he does not believe the highest ranked candidates are the best qualified. He does not believe the Board's procedure is the best possible system.

21. Neither Chief Gallant nor Chief Laughlin are aware of any meaningful, job related method by which to compare the relative qualifications of candidates for promotion. Laughlin is not aware of any way in which to quantify the value of diverse or competing varieties of experience.

22. Gallant would, however, reject any candidate he could show is unqualified and has in fact rejected a black firefighter certified for promotion to Fire Lieutenant.

23. The United States (and, apparently, the individual plaintiffs) have suggested that the following criteria could and should have been considered by Chief Gallant to compare the qualifications for promotion of the individual plaintiffs to the promoted blacks: 1) the raw, converted, and final scores achieved on the Board administered promotional exam, together with the rank of the individual on the "eligible

register"; 2) the BFRS seniority (length of service on the department) of each candidate for promotion; 3) the highest formal station assignment held by a candidate; 4) whether a candidate has been "certified" by the BFRS as a driver or assistant driver of an apparatus; 5) the number of months each candidate served as a leadworker or medic; 6) the number of shifts served by an individual as an acting officer; 7) any educational pay incentive received by the individual; and 8) other firefighting experience (aside from that gained in the BFRS).

Test Score and Rank

24. Under state law, the Board has the authority and duty to "certify" candidates to the City for all positions, entry level or promotional, in the Classified Service.

25. In fulfilling this obligation, the Board administers written examinations. The Board then grades the examinations, first determining a "raw score," or simply the number of questions an individual answers correctly. The Board then sets a passing point and calculates a "converted score" on a scale of seventh (70) to one hundred (100), for those who passed the exam. A "final score" is determined by adding to the converted score one point for each year of service in the classified service in the City up to twenty (20) years. Finally, the Board ranks the candidates on an "eligible register" based on the final scores.

26. Plaintiffs contend that the City should have considered test and rank information in comparing candidates for promotion. The City and Defendant-Intervenors respond that, assuming a duty to compare qualifications, the information was not reliably available to the City, nor was information necessary to enable the City to determine the significance of any differences in test scores. (The issue of the validity, *vel non*, of the examinations has been severed. In light of the Court's disposition of the case, that issue need not be reached.)

27. When a department has promotional vacancies, it prepares a "request for certification" of promotional candidates. Prior to forwarding the request to the Personnel Board, the City Office of Personnel reviews the Request for

Certification to determine, *inter alia*, whether the department is in compliance with its affirmative action plan. If not, a notation is stamped on the request, indicating that the City requests that qualified blacks and/or females be certified. The City then receives a certification of the names of individuals eligible for promotion. Prior to the entry of the Decree, the City received a number of names equal to the number of vacancies plus two additional names ("Rule of 3"). Since the entry of the City Decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, plus the names of a sufficient number of black individuals to enable the City to meet its City Decree goals.

28. The Board forward the certification to the City Office of Personnel which, after reviewing the certification to determine that a sufficient number of names have been identified, forwards the certificate to the department.

29. The department head selects a candidate from the certification and submits a recommendation for the Mayor's approval.

30. The only entry which can verify test score and ranking data is the Personnel Board.

31. The Certification contains only a list of names, with no reference to any score or rank (the rank of white individuals can be inferred, at least initially, by the order in which they are certified; the rank of selectively certified blacks is not reflected, nor can it be ascertained from the face of the certification.)

32. The City has never received test score information from the Board and has never relied on test scores in making promotions (except for a single interval, the circumstances surrounding which render it irrelevant to the instant controversy).

33. The Board rules and Regulations provide that test scores are confidential by reason of public policy. Test-takers, however, receive a card from the Board indicating their rank and final composite score, and many test-takers reveal such information to their peers.

34. The testimony concerning whether the Board would have provided test scores to the City had the City requested them was inconclusive. Although the City never requested testing information from the Board, the Court concludes that the test scores were not available to the City from the Board.

35. Plaintiffs contend that the City could have required rank and test score information from "informal lists", reflecting rank and test score information, created by individual promotional candidates and frequently posted, as a matter of general interest, at the stations. The lists do not include descriptive statistics, such as standard error of measurement.

36. The informal lists are created through a "grapevine" process of calling various test-takers to ascertain their rank (and sometimes score) as well as the rank of any other individuals of which they may claim knowledge. BFRS Battalion Chiefs make daily rounds at each station and sometimes look at these informal lists. Some of the information contained on the informal lists has occasionally been shared with Chief Gallant or Chief Laughlin on an informal basis.

37. The informal lists are rarely complete beyond the first ten (10) to fifteen (15) positions (if complete to that point), and reflect the scores of between zero and fifty (50%) percent of the individuals listed. Information concerning the rank (and perhaps the score) of persons ranked below position #15 is sometimes contained on the lists, and some of the informal lists received as exhibits reflected the rank of some of the black promotees.

38. The City considers efforts by the City employees to compile score and ranking data unreliable.

39. Due to problems with clerical errors, the City does not consider the Personnel Board card sent to examinees to be a reliable source of score and rank information.

40. The lists are generally, though not entirely, accurate with respect to the rank of the top ten (10) to fifteen (15) individuals, where listed, but are not as accurate with regard to the test scores listed, if any.

41. The Court concludes that the informal lists do not provide sufficiently complete or reliable information to enable the City to make any meaningful judgment regarding relative qualifications of promotional candidates.

42. The plaintiffs also contend that the City could have acquired test score information from the Board Consent Decree reports filed with the Court. Comparison of the filing dates of the Board's report with dates of promotions reveals that Woodrow Laster was the only black whose score could have been ascertained prior to his promotion and the Court had previously determined that Mr. Laster was promotable at a hearing on April 23, 1982. Moreover, there is no evidence suggesting that these reports were contemplated as a source of test score data and were not, under the terms of the Personnel Board Consent Decree, required to be furnished to the City.

43. Dr. Bernard Siskin is an expert qualified to testify concerning statistics.

44. Dr. Siskin analyzed the probability that the difference between two individuals' test scores would be as observed if their true test scores were a given number of standard errors of measurement ("SEMs") apart.

45. Dr. Siskin did not in view of the Court's limitations as to the scope of trial conduct any studies to attempt to determine whether the Personnel Board's examinations are job related.

46. Dr. Siskin compared the test scores of selected (*i.e.* promoted) blacks with the test scores of certain non-selected (*i.e.* non-promoted) whites. He used test scores from the 1982, 1983 and 1984 fire lieutenant's exam and for the 1983 fire captain's exam.

47. Dr. Siskin concluded that, at the .05 level of significance, several non-selected whites' true test scores exceeded the true test scores of selected blacks by 4 or more SEMs.

48. The SEMs used by Dr. Siskin for the examinations he considered had been calculated by the Personnel Board and provided to him by counsel for the United States. The SEMs

had been calculated based on the Kuder-Richardson 20 reliability coefficient ("KR20"). He used raw examination scores, and, given the date he had, converted scores could not be used. However, he testified that he did not believe that there would be much difference in the results if converted scores were used rather than raw scores.

49. If the City had had all of the converted scores for a particular examination, it could calculate the standard deviation. The reliability coefficient which he used for raw scores could reasonably be used to calculate the SEMs for converted scores.

50. To calculate the SEMs, the City would have had to have the reliability coefficient and the standard deviation of the test being considered.

51. To calculate the standard deviation, the City would have had to have all of the examinees' scores on a particular examination.

52. To calculate the KR20, the reliability coefficient Dr. Siskin used, the City would have had to have the number of correct responses given to each question on the exam. Without the pass/fail rates for any of the questions, the KR20 could not have been determined.

53. Dr. Siskin's analysis could not have been done by the City if the only information available to the City were the informal lists of examinee's ranks and scores reflected in PX 162, PX 163, PX 164 and PX 165. There is no evidence that any of the informal lists contained enough information to conduct Dr. Siskin's analysis.

54. The Court concludes that the City had no source from which it could reliably obtain sufficient information to consider in any manner on the test score of a candidate on a promotional exam in comparing competing candidates. The City officials making (or recommending) candidates for promotions did not on any occasion have sufficient reliable information about the test scores and about the significance of the differences in these scores to have been justified in not promoting a minority candidate.

BFRS Seniority

55. Plaintiffs appear to rely on seniority as a proxy of sorts for experience gained in the BFRS. It is basically agreed that experience as a firefighter with the BFRS is valuable in terms of performing the duties of lieutenant or captain. However, the amount of experience necessary or desirable, a manner in which to quantify experience for purposes of comparing the experience of the individuals, and the relationship of years of service to experience gained appears to be largely matters of personal opinion.

56. Several witnesses, including a Battalion Chief, take the view that the quality and quantity of experience gained in a given amount of time varies widely depending on the activity of a station and the general nature of the emergencies in its territory (e.g. industrial or commercial firefighting versus residential firefighting). Other witnesses, including a Battalion Chief, testified that the station assignment is of little significance. Yet other witnesses fall between the two extremes, agreeing that station assignment can make a difference, but assigning varying degrees of significance to that difference.

57. No witness was able to state a manner in which the difference in experience could be meaningfully measured or quantified in any fashion, much less one that would reasonably measure the job relatedness of that criterion. To the contrary, those questioned on the matter professed an inability to quantify or compare experience. The Court thus finds it unnecessary to adopt any opinion as to the degree to which experience may vary, due to the Court's finding that experience cannot be measured or compared for purposes of predicting job performance as lieutenant or captain.

58. It appears clear that experience does vary to some undetermined and undeterminable extent from station to station, and hence the Court concludes that time in service is not a reliable or uniform measure of experience.¹

59. Most importantly, there is no evidence demonstrating a relationship between BFRS seniority and job performance as an officer.

60. Additionally, the first black was not hired on the department until 1968, and only one additional black was hired prior to the initiation of the *Martin* suit in 1974. This underrepresentation resulted at least in part from discrimination against blacks. In light of the obvious adverse impact on blacks which results from considering seniority, together with the absence of any suggestion that seniority predicts job performance, the Court finds that seniority is not a factor which can be considered under the City Decree in selecting between black and white candidates.

Highest Formal Station Assignment

61. Within the general classification of firefighter, various positions exist. For example, on the engine, the positions from lowest to highest are plugman, back-up man, nozzleman/assistant driver, and driver (the driver is also frequently a "leadworker" position, recognized by the Board in the form of 5% premium pay — the leadworker position will be addressed separately, below)

62. The general rule, which appears to be followed the vast majority of the time, is that station positions are assigned based on station or department seniority. While there was testimony that the captain, who assigns positions, has the discre-

¹ "[I]t could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion." *In re: Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. at 5 n.14.

tion to appoint a less senior firefighter to a position "above" a more senior firefighter, that appears to occur very rarely, and then usually due only to the preference of the senior firefighter not to take the higher position.

63. While there was testimony that the leadworker position provides valuable experience for the rank of lieutenant, there was no testimony suggesting that serving in one of the remaining positions, as opposed to another, had any bearing on the qualifications of an individual to serve as lieutenant or captain. The only testimony in that regard was from Battalion Chief Bolin, who stated that he "certainly wouldn't want to make a statement that a plugman wouldn't be eligible to be a lieutenant." (While each position carries with it a specific responsibility upon arriving at a fire, the evidence reflects that once these responsibilities are fulfilled, every firefighter assists in any manner necessary or helpful at the fire scene.

64. Most significantly, there is no evidence that the specific position(s) held as firefighter are predictive of performance as lieutenant or captain.

65. Because there is no evidence that position assignment as a firefighter is predictive of performance as a lieutenant or captain, and because position assignment is tainted by reliance on seniority, the Court concludes that highest formal station assignment held is not a permissible criterion on which to base promotional decisions, particularly in light of the underlying intent of the City Decree.

Certification as Driver

66. The policy of the BFRS is to require that drivers and assistant drivers be "certified" as qualified to drive an apparatus by passing an "examination" of skills administered by Captain Smith at the drills and training field. The BFRS prefers that anyone in a position which makes it likely that he or she will need to fill in as driver also be certified, though that is not always possible, and hence, not always the case.

67. In order to take the driver's test, an individual must successfully acquire a letter from his captain to Captain Smith, requesting that Smith administer the test and stating the

Captain's belief that the individual is prepared for the test. It is the obligation of the individual's officer to prepare him for the driver's exam who hence bears partial responsibility for a firefighter's test result. One of the blacks testified that the reason why he was not certified as a driver was that at his station only those one level below the driver could take the driver test.

68. The driver's exam is administered by Smith and includes knowledge of the equipment and the apparatus, use of that equipment, hydraulics, and a road test. The individual is tested on the apparatus he usually rides. If he does not ride an engine, he is tested on the engine at his station as well. A firefighter need pass the driver's test only once, regardless of whether he transfers to an apparatus on which he has never been tested.

69. The test is oral, rather than written, and there apparently exists no document reflecting the questions to be asked. Though the test in each case seems to be fairly uniform and exhaustive, there are no guarantees of consistency. The grading also appears to be flexible.

70. The first black to pass the test was Leslie Garner, who did so in 1972. Only 16 blacks have since passed the driver's test.

71. Records of those passing the test are forwarded to the Chief's office; records of those failing are not.

72. While Smith testified that the driver's test is job related to the job of driving a fire apparatus, he testified only that the knowledge covered by the driver's test was "useful" to a fire lieutenant in the performance of his duties.

73. The Court concludes that the right to take the test, the test itself, and the scoring thereof, involve too much latitude left to be exercised at the discretion of superior officers. This makes the criterion of certification as driver the kind which has been found to be particularly suspect as likely to be affected by the biases of the superior. Moreover, there is no evidence on which to base a finding that passage of the driver's test is predic-

tive of performance as a lieutenant or captain. It is not a permissible criterion on which to base promotional decisions.

Months Served as Medic

74. A "medic" is a state licensed paramedic capable of performing advanced life support procedures. The training of a medic is extensive, and in light of the fact that 60% of all the BFRS runs are for emergency medical service, it certainly appears to be valuable experience for an employee of the BFRS of any rank.

75. While there was testimony that being a medic was beneficial to a Lieutenant, there was also evidence that it should not be considered, and there is no evidence suggesting that whatever benefit it confers can be quantified.

76. More significantly, there is no evidence showing that qualifying as a medic is predictive of job performance as a lieutenant or captain.

77. Moreover, the evidence reflects that over the history of this program whites have had a somewhat greater opportunity than blacks to achieve medic status. The medic program was established in 1973. No black firefighters of the BFRS were in either of the first two medic classes attended by employees of the BFRS; the department paid the tuition for that training and allowed the selected employees to receive the training, in part, on company time. Witnesses have been able to name only a few black paramedics out of 120 in the department as a whole. Whether this was based on the intentional exclusion of blacks from the medic program or, as is more likely, resulted from the earlier exclusion of blacks from the department as a whole is irrelevant. The fact remains that blacks as a group are substantially underrepresented in the medic ranks, a status which is likely to continue since the BFRS in 1982 stopped paying tuition and allowing time off for paramedic training. Reliance on medic status cannot be validated and is an impermissible criterion for comparing promotional qualifications.

Months Served as Leadworker and Shifts as Acting Officer

78. Leadworker status is the highest position which can be obtained by a firefighter in the BFRS. The position of leadworker carries with it responsibilities beyond those of other firefighters. A leadworker assists his or her Lieutenant in the performance of supervisory duties and can be called upon to serve as acting officer in the absence of the regularly assigned officer. An acting officer has the duties, responsibilities and privileges of an officer.

79. The evidence reflects the leadworker position can give a firefighter valuable experience for serving as an officer.

80. The leadworker position is usually assigned on the basis of station seniority.

81. Assignment to leadworker is based on the discretion of the captain. In cases when the most senior firefighter is not promoted to leadworker, the captain chooses the leadworker based on his subjective opinion of who is most qualified. Criteria which are influenced by the subjective evaluations of supervisors are, obviously, in this context suspect.

82. However, the evidence does not support a conclusion that the mere fact of service as leadworker or acting officer predicts successful job performance as an officer. While it is self-evident that leadworker and acting officer experience is valuable, and the record so reflects, there has been no testimony concluding that serving as leadworker or acting officer will necessarily make an individual a good officer. To the contrary, Battalion Chief Wood notes that the value of the acting officer experience is determined by how well the individual performs as an acting officer. The mere fact of service does not reveal enough.

83. Additionally, as is the case with all criteria based substantially on seniority, blacks have not as a whole, had the same opportunities as whites to meet this proposed criterion. The testimony indicates that only one black has ever served as leadworker.

84. Due to the clear adverse impact on blacks and the absence of evidence that service as leadworker or acting officer will successfully predict job performance, leadworker and acting officer status are not permissible criteria on which to base promotional decisions.

Educational Pay Incentive

85. Pursuant to the Board rules, incentive pay is awarded for certain educational accomplishments. An individual who obtains an AAS degree in Fire Science (offered at Jefferson State Junior College) will receive a 5% pay increase. An additional 5% may be obtained if an individual earns a four year degree in certain, specified fields (e.g., Business Administration).

86. The Fire Science Curriculum at Jefferson State consists of approximately twenty-six (26) courses, thirteen (13) fire related courses and thirteen (13) liberal arts courses.

87. As with the other criteria heretofore discussed, opinions as to the value of fire science course work cover a broad range. A Fire Science degree was considered highly significant by some witnesses, yet relatively unimportant to others. Those who thought it should be considered in promotional decisions were unable to assign a weight to its value relative to other criteria. Others thought it should not be considered at all in making promotional decisions.

88. More significantly, there was no evidence that lieutenants or captains with a Fire Science degree perform better than lieutenants or captains without such a degree, or that a Fire Science degree predicts to any demonstrable extent the performance of an individual as an officer. Having a Fire Science degree, hence, has not been shown to be a job related selection criterion.

89. As to credit for non-fire-related degrees, there has been little or no explanatory testimony that such a degree is related to the responsibilities of a fire officer. The Court finds that any possible connection is tenuous at best and whether a candidate has a liberal arts degree is not an appropriate measure of comparison.

Other Firefighting Experience

90. The testimony reflects that firefighting experience gained outside the BFRS may be helpful, but again may not. It would certainly appear to depend on the extent and complexity of the prior experience, factors not taken into account by the United States. It appears that the BFRS's extensive training subsumes all but extensive, sophisticated prior experiences.

91. More importantly, there is no evidence demonstrating a relationship between outside firefighting experience and performance as a lieutenant or captain. It is not a job related selection criterion.

92. The Court finds that prior fire experience is not a permissible criterion on which to base promotional decisions in the Fire Department.

Selection Procedure

93. The United States and plaintiffs have suggested that the foregoing criteria should have been considered collectively to compare promotional candidates. The City and Defendant-Intervenors have responded, not unfairly, that the factors are a "hodge-podge" of unvalidated criteria.

94. Irrespective of the value of any individual criterion standing alone, the Court recognizes that there has been no testimony explaining, or even suggesting, how each of the criteria should or could have been weighed and evaluated against other criteria. Those who testified on the subject were unable to suggest an analysis; and the record reflects that each individual questioned had a different notion of whether, and to what degree, a particular factor was of significance or should be considered in making promotions.

95. While plaintiffs presented a great deal of evidence suggesting that meeting certain criteria could be useful to an officer, this Court has heard not an iota of evidence that officers who meet any or all of those criteria actually perform better as officers than those who do not. Plaintiffs, in short, have not presented evidence that their proposed criteria can be combined to create a job related selection procedure, *i.e.*, a method of

evaluating candidates which will accurately predict their future performance as officers.

96. Therefore, the plaintiffs have not demonstrated that any of the individual plaintiffs, were at the time of their promotion demonstrably better qualified than any of the blacks certified from the same eligible register based on the results of a job related selection procedure.

Engineering Department

97. John Duncan recommends candidates for promotion in the Engineering Department. Because Duncan is personally familiar with most of the people in the Engineering Department, his promotional practice, both pre-and post-Decree, is to base his recommendation for promotion on his assessment of the job duties of the position in question, and his knowledge of the past experience, job performance and training of the candidates for promotion. Hobson Riley, Assistant City Engineer, assists Duncan in selecting candidates for promotion by interviewing the candidates and making recommendations to Duncan. Of course, Duncan considered the requirements of the City Decree.

98. In Duncan's view, the Personnel Board determines whether an individual is qualified; Duncan also evaluates the individual and makes an independent determination.

99. Neither Duncan nor Riley were aware of the test score or rank of Lucious Thomas prior to his promotion.

100. Riley and Duncan discussed the promotional list and recommended Lucious Thomas for the position of civil engineer based on the requirements of the City Decree.

101. Lucious Thomas was qualified for the civil engineer position.

102. The reasons Duncan considered Ware better qualified than Lucious Thomas were: his higher rank on the certification of eligibles, his seniority, the fact that his job performance was slightly better (though he also testifies that they were "about equal"), and the fact that Mr. Thomas was black.

103. Duncan considered the fact that Ware was white to be a positive factor which would have supported the selection of Ware.

104. Though Jack Dunlap, a former supervisor of Thomas, had certain criticisms of Thomas' past performance, Dunlap did not discuss these criticisms with Duncan prior to Thomas' promotion to civil engineer. Dunlap had also recommended Thomas for promotion to Chief of Party based on his job performance.

105. Duncan believes that Lucious Thomas was not demonstrably less qualified than Kenneth Ware, and the Court so finds.

106. The promotion of Thomas was made pursuant to, and was required by the City Decree.

Involvement of City Administration and Promotions

107. Aside from the selection of department heads, the Mayor of the City of Birmingham and the Mayor's office have very little involvement in making promotional recommendations in the Engineering and Fire Department. Typically, the City's Office of Personnel reviews all personnel matters with the exception of Department head promotions without the involvement of the Mayor's Office.

108. The Mayor's view is that the certification of an individual for promotion by the Personnel Board creates a presumption that the individual is qualified. The information provided to the City by the Board relative to individuals' qualifications is scanty. The Mayor has never seen test scores of individuals certified as eligible for a position with the City of Birmingham — even of those candidates for department head positions, despite the Mayor's having requested the Personnel Board to allow him to see all the information that was available on candidates for the position of Police Chief.

109. The Court finds further that the Mayor's involvement in reviewing promotions within the Fire Department and the Engineering Department of the City of Birmingham is so slight that it merits no further attention by this Court.

110. Gordon Graham, the Chief Personnel Officer of the City of Birmingham, is responsible for directing the activities of the Office of Personnel which includes supervision of personnel records, affirmative action responsibilities, benefits administration, administering the occupational safety and health plan and labor relations. Pursuant to the Consent Decree, the Mayor further designated Mr. Graham as the City's Affirmative Action Officer.

111. When the City rejects a certified candidate on the basis that the individual is not qualified, the Personnel Board ordinarily recertifies the rejected candidate.

112. The only factors department heads are required to consider in making promotional recommendations are the individuals certified by the Personnel Board, the requirements of the Consent Decree and the City's preferential policy toward City residents.

113. All applicants certified by the Personnel Board are presumed qualified unless a candidate lacks some essential skill that the Personnel Board did not test.

114. As Affirmative Action Officer of the City, Mr. Graham is responsible for reviewing, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented under the terms of the Consent Decree.

115. The City has no formal promotional criteria. Department heads have been instructed to recommend candidates who in their judgment are qualified.

116. On occasions the Office of Personnel has accepted explanations of the failure to recommend a certified black or female pursuant to a determination by the department head that the female or black was less qualified.

117. If a department fails to recommend a certified black or female and the Consent Decree goals have not been met, when the Office of Personnel receives the recommendation from the department head he reviews the recommendation to

determine if there was sufficient written justification for the failure to select a black or female.

City Decree Interpretation

118. One purpose of the City Decree was to insure that any disadvantages to blacks and women that may have resulted from past discrimination against them are eliminated.

119. One purpose of the City Decree was to avoid the burdens and expense of litigation.

120. Paragraph 5 of the City Decree obligates the City to adopt as a long term goal the employment of blacks and women to each job classification in each department of the City in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the 1970 Federal Census.

121. Paragraph 6 of the City Decree obligates the City to establish and attempt to achieve an annual goal of making probational appointments of blacks to vacancies in the position of Fire Lieutenant at a rate of 50% or at the rate of black representation among applicants, whichever is higher.

122. Paragraph 8 of the City Decree obligates the City to promote at least one black to the next two Captain vacancies in the Fire Department.

123. The goals referred to above and set out in paragraphs 5, 6 and 8 of the City Decree are expressly made subject to the availability of qualified black applicants; the aforementioned goals are not expressly made subject to the availability of black candidates who are not demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

124. The purpose of the aforementioned goals is to correct the effects of any underrepresentation of blacks and women in the City's work force.

125. Paragraph 10a of the City Decree obligates the City to request the Personnel Board to certify selectively to the City for appointment qualified blacks and females, whenever such

action is necessary to enable the City to meet the aforementioned goals.

126. Paragraph 3 of the City Decree provides that "remedial actions and practices required by the terms of or permitted to effectuate and carry out the purposes of the Consent Decree shall not be deemed discriminatory within the meaning of . . . the provisions of 42 U.S.C. § 2000e-2(h), (j)".

127. Paragraph 2 of the City Decree provides that nothing in the City Decree shall be interpreted as requiring the City to hire or promote a less qualified person in preference to a person who is "demonstrably better qualified based upon the results of a job related selection procedure".

128. The purpose of paragraph 2 was to relieve the City from liability under the Decree if, although otherwise required by the Decree, it should reject a minority candidate because the results of a job related selection procedure show that person to be demonstrably less qualified.

129. The hiring and promotion by the City of less qualified blacks in preference to competing white candidates who are demonstrably better qualified based upon the results of a job related selection procedure is permitted to effectuate and carry out the purposes of the Decree.

130. The City Decree authorizes the City, in order to meet the aforementioned goals, to hire and promote black candidates who are certified as qualified by the Personnel Board, even if such candidates are demonstrably less qualified than competing white candidates based upon the results of a job related selection procedure.

131. The phrase "job related selection procedure", as used in paragraph 2 of the City Decree, means a selection procedure which is validated or capable of being validated.

132. The word "demonstrably", used in paragraph 2 of the City Decree, means both clearly and measurably.

133. A selection procedure which relies in substantial part on subjective criteria is not a related selection procedure within the meaning of paragraph 2 of the City Decree.

134. The use of a selection procedure which has a component that would perpetuate the effects of past discrimination would be contrary to the express purposes of the City Decree; such selection procedure is not a "job related selection procedure" within the meaning of paragraph 2.

135. The City Decree does not obligate the City to compare the relative qualifications of black and white candidates for promotion prior to hiring or promoting blacks.

136. The City Decree does not obligate the City to adopt a job related selection procedure.

137. The City Decree does not obligate the City to compare scores achieved on promotional examinations by black and white candidates prior to promoting blacks.

138. With the possible exception of Albert Isaac, the City has not identified any of the black promotees as individual victims of past discrimination. Promotee Albert Isaac was a recipient of backpay pursuant to the City Decree. Nor has any evidence been submitted indicating in fact that any other black promotee is an individual victim of past discrimination.

139. In the course of the promotional process, the City never considered or compared the qualifications of competing candidates for promotion in the BFRS (outside of the fact of certification from the Board).

140. Each of the plaintiffs is qualified for the promotion he claims was illegally denied to him.

141. But for their race, each of the plaintiffs would have been promoted to the position which he claims was illegally denied to him.

142. Had each plaintiff been black, he would have been promoted to the position which he claims was illegally denied to him.

143. None of the individual plaintiffs (nor their privies) are parties to the City Decree or the Board Decree.

144. But for the Board Decree and the City Decree, none of the black promotees would have been certified for the promotions they ultimately received.

145. The City does not use a job-related selection procedure in evaluating the qualifications of certified candidates or in comparing candidates' qualifications. The City has made no effort to develop or ascertain the cost of such a procedure.

146. The City made no judgment during the promotional process about the relative qualifications of the certified black and white BFRS promotional candidates.

147. In September 1981, 9.4% of the individuals in the classification of fire fighter were black.

148. In March 1982, 10.54% of the individuals in the classification of fire fighter were black.

149. In June 1983, 12.64% of the individuals in the classification of fire fighter were black.

150. In March 1985, 12.98% of the persons in the classification of fire fighter were black.

CONCLUSIONS OF LAW

151. The City Decree is lawful. It was approved by this Court in *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981) and plaintiffs cannot collaterally attack the Decree's validity. See *Thaggard v. City of Jackson*, 687 F.2d 66 (5th Cir. 1982); *Dennison v. Los Angeles Department of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Austin v. County of DeKalb*, 572 F. Supp. 479 (N.D. Ga. 1983). The United States has conceded it is not attacking the Decree's lawfulness and as a signatory it cannot. City Decree ¶ 3. The only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983). Furthermore, under all the relevant case law of the Eleventh Circuit and the Supreme Court, it is a proper remedial device, designed to overcome the effects of prior, illegal discrimination by the City of Birmingham. *United States v. Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala.

1981). See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Palmer v. District Board of Trustees*, 748 F.2d 595 (11th Cir. 1984); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985).

152. The burden of proof is on plaintiffs. Once defendants show that promotions were made pursuant to a consent decree, the burden shifts to the plaintiffs to prove by a preponderance of the evidence either that the promotions were not undertaken to meet the goals of the decree or that the decree is invalid. *Palmer v. District Board*; *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Evidence that race was considered in an affirmative action context is not the equivalent of the finding of direct discrimination that shifts the burden of persuasion to the defendants. *Doughtery v. Barry*, 607 F. Supp. 1271 (D.D.C. 1985).

153. In light of the City Decree, plaintiffs cannot prevail if they do not establish that the City acted with unlawful discriminatory intent. That an action was taken pursuant to a valid affirmative action plan or consent decree is proof that it was not taken with the requisite discriminatory intent. *United States v. Jefferson County*, 720 F.2d at 1518; *Palmer v. District Board*, 748 F.2d at 601.

154. "Job related selection procedure," as the term is used in paragraph two of the Decree, refers to a validated employee selection procedure. See *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979); *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

155. "Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employ-

ment goals only if such minority applicants are 'demonstrably' less qualified.²

156. The criteria upon which plaintiffs are relying to prove comparative qualifications have not been shown to be valid; furthermore, they are the kind of criteria that have been viewed suspiciously by courts because of their subjectivity and tendency to perpetuate the effects of past discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Miles v. M.N.C. Corp.*, 750 F.2d 867 (11th Cir. 1985); *Walker v. Jefferson County Home*, 726 F.2d 1554 (11th Cir. 1984); *Ensley Branch, NAACP v. Seibels*, 616 F.2d 812 (5th Cir. 1980). Any selection procedure which utilizes subjective criteria or length of service — or other criteria which have been tainted by subjectivity or consideration of length of service — cannot be reconciled with the City Decree, which was expressly intended to ensure an end to discrimination against blacks, and to remedy any disadvantage to blacks resulting from past discrimination.

157. The hodge-podge of "criteria" proposed by plaintiffs do not constitute a selection procedure. No formula has been offered, let alone proven valid, to assess the relative importance of the "criteria" offered by the plaintiffs. The overall approach is wholly subjective and is as invalid as its individual components.

158. Paragraph two of the Decree does not require the City to develop or use a job related selection procedure. It gives the City a limited option and limited defense should the City fail to meet the Decree's goals. This conclusion is compelled by the Decree's language and purpose, and is supported by the pre-Decree practices of the City and the Personnel Board.

159. Plaintiffs have not established that any of the white plaintiffs are demonstrably better qualified than any of the black

² Of the common meanings of the word "demonstrably" the ones most suitable in this context are "obviously" or "clearly". *In re: Birmingham Employment Litigation*, 37 Fair. Emp. Prac. Cas. 1, 6-7 (N.D. Ala. 1985).

promotees based on the results of a valid, job related selection procedure. The failure of plaintiffs to identify a selection procedure, let alone one that is valid and job related, compels that conclusion.

160. The City Decree entered by this Court, immunizes the City from liability for actions required by it. Any questions concerning this proposition should be dispelled in this Circuit under the present state of the law by the decision of the Court in *Palmer versus District Board*.

161. Race-conscious actions taken by an employer pursuant to a valid affirmative action plan are legal. *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983); *Palmer v. District Board of Trustees*, 748 F.2d 595, 601 (11th Cir. 1984).

Subsidiary Conclusions of Law

162. Information or opinions not known to the decision-maker may not be utilized to establish that there were job related selection devices showing one candidate demonstrably better qualified than another.

163. Evidence of prior discrimination by the City of Birmingham is admissible to establish the factual basis for the legality of the City Decree, to show that seniority based criteria are suspect as a result of prior underrepresentation, and that subjective criteria for evaluating promotions may be affected by the vestiges of such discrimination or the attitudes of those hired during such period.

164. Selection criteria which incorporate seniority or which are based on the subjective discretion or opinions of supervisors may not be considered in comparing black and white candidates under paragraph two of the City Decree.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JAMES A. BENNETT, FLOYD E.
CLICK, JAMES D. MORGAN,
JOEL ALAN DAY, GENE E.
NORTHINGTON, VINCENT JOSEPH
VELLA, and LANE L. DENARD,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as
Mayor of the City of Birmingham;
CITY OF BIRMINGHAM; JAMES E.
JOHNSON, HENRY P. JOHNSTON,
and HIRAM Y. McKINNEY, as
Members of the Jefferson County
Personnel Board; JOSEPH W.
CURTIN, as Director of the Jefferson
County Personnel Board; and
JEFFERSON COUNTY PERSONNEL
BOARD,

Defendants.

CIVIL ACTION
NO. CV82P-0850S

COMPLAINT

1. This Court has jurisdiction of this action under 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

2. Plaintiffs are all residents of Jefferson County, Alabama and over the age of twenty-one years.

3. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. 2000e(b).

4. Defendant Richard Arrington, Jr. is Mayor of the City of Birmingham and responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning and promoting of employees of the City.

5. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama, is an employer within the meaning of 42 U.S.C. 2000e(b), as amended, and is engaged in the procuring and screening of applicants and certification of eligibles for appointment with defendants named in paragraphs 3 and 4 and in the administration of a civil service system for such defendants.

6. Defendants James B. Johnson, Henry P. Johnston and Hiram Y. McKinney are members, and Joseph W. Curtin is Director of the Jefferson County Personnel Board, and as such they are responsible for its administration and operation, including the procuring and reviewing of applicants and certification of eligibles for appointment with defendants named in paragraphs 3 and 4.

7. The defendant City of Birmingham is a recipient of revenue sharing allocations from the United States Treasury pursuant to the provisions of the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 *et seq.*), and a recipient of funds from the United States Department of Justice pursuant to the Omnibus Crime Control and Safe Street Act of 1968, as amended (42 U.S.C. 3701 *et. [sic] seq.*).

8. Plaintiffs are all white, male firefighter employees of the City of Birmingham. Pursuant to the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date (hereinafter referred to as the "Civil Service Act"), the plaintiffs all have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. In partial discharge of their obligations under the Civil Service Act, the Personnel Board defendants and defendant Director ranked the 139 persons who passed the Fire Lieutenant examination and were otherwise eligible for promotion under the provisions of the Civil Service Act. The plaintiffs are the top seven ranked can-

didates of the 139 persons and were ranked in the following order:

1. Bennett
2. Click
3. Morgan
4. Day
5. Northington
6. Vella
7. Denard

9. The following persons are black male firefighter employees of the City of Birmingham who also have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. Among the said 139 persons who passed the said examination and were otherwise eligible for promotion, these said persons were ranked as follows:

23. James E. Lester
53. Ebb C. Finton
60. Tony G. Jackson
81. Henry Ward, Jr.
95. Carl J. Harper

10. On March 31, 1982, the City through the defendant Mayor Arrington requested the defendant Personnel Board, through its Director, to certify to it persons for promotion to five open Fire Lieutenant vacancies, a true copy of said request is attached hereto as Exhibit A. Said request for certifications requests that the Board and its Director certify names on the basis of race and further evidences the City's and Arrington's intention to promote employees on the basis of race.

11. Pursuant to the City's and Mayor's Exhibit A request, the Personnel Board defendants and its director made a certification of names, a true copy of which is attached hereto as Exhibit B. The Personnel Board defendants and its director, intentionally and knowingly certified the names on the Exhibit B certification on the basis of race.

12. The defendants City and Arrington are following a policy of hiring and promoting their employees on the basis of

race or color with black employees being employed, hired and promoted on the basis of their race in accord with numerical quotas or goals rather than purely upon merit and superior qualifications, all constituting illegal and unconstitutional discriminations against whites in hiring and employment practices.

13. The Personnel Board, its members and its Director are certifying candidates for hiring and promotion to the appointing authority on the basis of race, favoring blacks to the deference of whites, rather than in a color blind fashion and solely on the basis of merit, competition and superior qualifications.

14. The defendants are certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements entered into and approved by this Court in Case Numbers, 75-P-066-S, 74-Z-17-S, and 74-Z-12-S. The provisions of said settlements are illegal and the judgment of approval of said settlements is void on its face in that said consent decrees provide for defendants to act in a manner contrary to the provisions of the Civil Service Act, the Fourteenth and Fifth Amendments to the Constitution of the United States, Title VII of the Civil Rights Act of 1964, and other statutes as cited herein.

15. The failure of the Personnel Board, its members and its Director to certify all seven plaintiffs pursuant to the Exhibit A request is illegal and in violation of the Civil Service Act, as it is presently constituted.

16. The defendants' acts and practices described in paragraphs 8 - 15 constitute a pattern and practice of resistance to the full enjoyment of the rights of whites and plaintiffs in particular to equal employment opportunities within their jurisdictions and under their supervision and control. This pattern and practice is of such a nature and is intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fifth and Four-

teenth Amendments to the Constitution of the United States and by 42 U.S.C. § 1981. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

17. Plaintiffs further allege that the aforementioned consent decrees, as said decrees relate to plaintiffs, contain illegal and unconstitutional remedies and are void on their face.

18. Plaintiffs aver and believe the appointment of the persons listed in paragraph 9 to Birmingham Fire Lieutenants will occur with the next few days subsequent to the filing of this complaint, if, in fact, such appointments have not already occurred. Such appointment of said persons, on the basis of race, will cause immediate and irreparable damage and harm to plaintiffs, all in violation of their constitutional rights. The granting of a Temporary Restraining Order will not prejudice or irreparably harm the rights of defendants, but will maintain the status quo. Plaintiffs further offer to post sufficient security as set by the Court.

19. Plaintiffs aver that there is an actual controversy within the jurisdiction of this Court pursuant to 42 U.S.C. § 2201 as to the rights and other legal relations of the parties concerning the legality of the defendants' actions and the aforementioned consent decrees.

20. In the alternative, and not conceding the validity of the consent decrees, plaintiffs aver that defendants are not properly implementing the consent decrees in that the Personnel Board has failed to certify plaintiffs Morgan, Day, Northington, Vella and Denard and the City is attempting to appoint more blacks than permissible under the terms of the City decree which plaintiffs further aver is void for vagueness.

21. Plaintiffs further aver that the Personnel Board and its Director, in contravention of their statutory duties, have so altered and modified their testing procedures and grading procedures so as to pass and certify as eligible persons who are not in fact minimally qualified for the position of Fire Lieutenant, all in an effort to meet the provisions of the consent decrees and thereby the Personnel Board is certifying unqualified persons instead of all seven plaintiffs.

22. Plaintiffs offer to do equity.

WHEREFORE, plaintiffs pray that defendants, their officials, agents, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory employment practice based on race or sex, and specifically from:

- a. Failing or refusing to recruit, hire, assign and promote white applicants and employees on an equal basis with black applicants and employees;
- b. Failing or refusing to recruit, hire, assign and promote male applicants and employees on an equal basis with female applicants and employees;
- c. Failing or refusing to eliminate qualifications, and other selection standards which have not been shown to be job related and which disproportionately exclude white and males;
- d. Failing to certify plaintiffs as eligible candidates for promotion to Fire Lieutenant pursuant to the Exhibit A request;
- e. Failing to strictly follow the certification and appointment provisions of the said Civil Service Act;
- f. Enforcing or complying with the provisions governing promotional goals or quotas relating to Fire Department promotions or special certification provisions so as to insure appointments in compliance with said goals as provided in paragraphs 5, 6 and 8 of the City of Birmingham consent decree and paragraphs 23 and 34 of the Personnel Board consent decrees, all as referred to in paragraph 14 of this Complaint.

Plaintiffs further pray that this Court will enter its declaratory judgment governing the rights, status and obligations of the parties and find the said consent decrees and judgment approving them to be void as illegal, unconstitutional, vague and indefinite, and violative of public policy. Plaintiffs further pray this Court will enter its declaratory judgment concerning the legality and validity of the actions of defendants as described

in paragraphs 8 - 21 of this Complaint, and for such other related declaratory relief to which plaintiffs may be entitled.

Plaintiffs further pray for monetary and punitive damages, a reasonable attorney's fee for their counsel of record, and court costs.

Plaintiffs pray such other alternative or general relief to which they may be entitled.

/s/ John S. Foster

John S. Foster

/s/ Raymond P. Fitzpatrick, Jr.

Raymond P. Fitzpatrick, Jr.

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Gene E. Northington
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Birmingham, Alabama 35209

Vincent Joseph Vella
620 Grove Street
Birmingham, Alabama 35209

Lane L. Denard
Rt. 2, Box 292C
Pinson, Alabama 35126

SERVE DEFENDANTS AT:

City of Birmingham and Mayor Arrington:

City Hall
Birmingham, Alabama 35203

Personnel Board, Its Members, Director Curtin:

Annex, Jefferson County Courthouse, Room 301
Birmingham, Alabama 35203

VERIFICATIONS

STATE OF ALABAMA]

JEFFERSON COUNTY]

Personally appeared before the undersigned authority in and for said State and County JAMES A. BENNETT, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ James A. Bennett
JAMES A. BENNETT

Subscribed and sworn to this 8th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA]

JEFFERSON COUNTY]

Personally appeared before the undersigned authority in and for said State and County FLOYD E. CLICK, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ Floyd E. Click
FLOYD E. CLICK

Subscribed and sworn to this 7th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA]

JEFFERSON COUNTY]

Personally appeared before the undersigned authority in and for said State and County JAMES D. MORGAN, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ James D. Morgan
JAMES D. MORGAN

Subscribed and sworn to this 7th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA]

JEFFERSON COUNTY]

Personally appeared before the undersigned authority in and for said State and County JOEL ALAN DAY, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ Joel Alan Day
JOEL ALAN DAY

Subscribed and sworn to this 7th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA

JEFFERSON COUNTY

Personally appeared before the undersigned authority in and for said State and County GENE E. NORTINGTON, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ Gene E. Northington
GENE E. NORTINGTON

Subscribed and sworn to this 7th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA

JEFFERSON COUNTY

Personally appeared before the undersigned authority in and for said State and County VINCENT JOSEPH VELLA, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ Vincent Joseph Vella
VINCENT JOSEPH VELLA

Subscribed and sworn to this 8th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

STATE OF ALABAMA

JEFFERSON COUNTY

Personally appeared before the undersigned authority in and for said State and County LANE L. DENARD, who, after being duly sworn, states that he has knowledge of the facts set forth in the above and foregoing complaint, and avers that all of said facts are true and correct.

/s/ Lane L. Denard
LANE L. DENARD

Subscribed and sworn to this 8th day of April, 1982.

/s/ R. P. Fitzpatrick
NOTARY PUBLIC

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEFFERSON COUNTY, *et al.*,

Defendants.

CIVIL ACTION
NO. 75-P-0666-S

JOHN W. MARTIN, *et al.*,

Plaintiffs,

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants.

CIVIL ACTION
NO. 74-Z-17-S

ENSLEY BRANCH OF THE
N.A.A.C.P., *et al.*,

Plaintiffs,

v.

GEORGE SEIBELS, *et al.*,

Defendants.

CIVIL ACTION
NO. 74-Z-12-S

**CONSENT DECREE WITH THE CITY OF
BIRMINGHAM**

The plaintiffs filed their complaints in these consolidated actions against the City of Birmingham and others to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, the State and Local Fiscal Assistance Act of 1972, as amended,

31 U.S.C. §1221, *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3766(c)(1), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981, 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States. In their complaints, the plaintiffs alleged that the City of Birmingham and the other named defendants had engaged in a pattern or practice of discrimination based on race and sex with respect to recruitment, hiring, assignment, promotion, discipline, and other terms and conditions of employment. The City of Birmingham has denied the allegations in the plaintiffs' complaints.

The parties to this Consent Decree are the plaintiffs in the consolidated actions captioned above and two of the named defendants in those actions, the City of Birmingham and Richard Arrington, acting in his official capacity as the Mayor of the City of Birmingham. By entering into this Consent Decree the parties express their desire to avoid the burdens and expense of any further litigation in these actions and to insure that any disadvantages to blacks and women that may have resulted from any past discrimination against them are remedied so that equal employment opportunities will be provided to all. The parties waive any findings of fact and conclusions of law on all outstanding issues solely pertaining to the City of Birmingham except for costs and attorneys' fees. The parties will seek to reach agreement on the amount of attorneys' fees and costs for the private plaintiffs in these consolidated actions. If agreement cannot be reached on the amount of such fees and costs, this matter shall be submitted to the Court for determination. The United States waives any entitlement it may have to recovery of costs. This Decree shall not constitute an adjudication or admission by the City of Birmingham or others signatory to this Decree of any violation of law, executive order or regulations. The parties accept this agreement as final and binding among the parties signatory hereto as to the issues resolved herein.

The plaintiffs recognize the adoption by the City of Birmingham of Sections 2-4-51 through 2-4-56 of the Birmingham City Code ("the fair hiring ordinance"), the annual preparation and implementation by each department of the City of Birmingham of affirmative action plans in accordance with the fair

hiring ordinance, and the issuance by the Mayor of the City of Birmingham of Administrative Directive AA-1 and Executive Order 17-77, as evidence of good faith efforts by the City of Birmingham to take meaningful affirmative action to increase minority and female participation throughout the City's work force.

Now therefore, on the basis of the foregoing representations of the plaintiffs, the City of Birmingham and the Mayor of the City of Birmingham, and all trial proceedings and discovery filed herein to date, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. GENERAL PROVISIONS

1. The defendant City of Birmingham, its officials, agents, employees, and all persons in active concert or participation with them in the performance of city functions (herein collectively referred to as the City) are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or prospective applicant with, the City of Birmingham because of such individual's race, color or sex. Specifically, the City shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions or privileges of employment. Further, the City shall not retaliate against or in any way take action against any person because that person opposes or has opposed alleged discriminatory policies or practices in the City of Birmingham, or because of that person's participation in or cooperation with the investigation and trial of these actions, or in any proceedings therein.

2. Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure. Nothing herein shall prohibit the City from discharging or disciplining employees for just cause in accordance with applicable law, provided however that any

such actions are taken and executed in a non-discriminatory manner without regard to race or sex, and are otherwise consistent and in conformity with the City's obligations under this Decree.

3. Remedial action, and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h), (j), and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the City shall notify counsel for the plaintiffs and remove such action to the United States District Court.

4. In the event plaintiffs seek to enforce any provision of this Decree they shall provide notice of their intentions to:

City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35203

Such notice shall state, with reasonable particularity, the nature of the alleged violation and the relief sought. The parties shall have a period of thirty (30) days within which to resolve the matter informally. If the parties fail to resolve the matter plaintiffs may, upon expiration of the thirty-day period, apply to the Court for an appropriate enforcement order.

II. GOALS

5. In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson

County as defined by the 1970 Federal Census. As a means of achieving the long term goal established by this Decree the City may prefer residents of the City for appointment. This long term goal shall be appropriately modified to reflect any changes in the racial and sexual composition of the applicable civilian labor force as reflected by the 1980 Census. The parties also preserve the right to adjust, through agreement and subject to the approval of the Court, any of the goals provided by this Decree where it can be shown that a professional degree, license or certificate is required to perform the duties of any particular job or jobs in the City's workforce and that blacks and/or women hold such degrees, licenses or certificates in percentage terms which are inconsistent with the goals provided.

A. Goals for Blacks

6. In order to achieve the long term goal in the job classifications set forth below, and subject to the availability of qualified black applicants for those jobs, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher.

Job Classification	Interim Annual Goal
1. Account Clerk	50%
2. Automotive Mechanic	50%
3. Building Inspector	33%
4. Construction Equipment Operator	50%
5. Firefighter	50%
6. Gardener	50%
7. Heavy Equipment Operator	50%
8. Labor Supervisor	50%
9. Police Officer	50%
10. Police Radio Dispatcher	50%
11. Police Sergeant	50%
12. Fire Lieutenant	50%
13. Public Works Supervisor	50%
14. Construction Supervisor	50%
15. Refuse Truck Driver	50%
16. Revenue Examiner	50%
17. Secretary	50%
18. Senior Clerk	50%
19. Senior Sanitation Inspector	33%
20. Zookeeper	50%

7. In order to achieve the long term goal in the job classifications within the job groups identified below, and subject to the availability of qualified black applicants for the jobs in those job groups, the City shall establish and attempt to achieve an annual goal of making probational appointments to vacancies in permanent, full-time positions in the classified service of black applicants at the rates set forth below or at the rate of black representation among applicants, whichever is higher. Attached as Appendix A to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	Interim Annual Goal
Group I—Engineering Department	
1) Professionals	25%
2) Technicians	25%
Group II—Finance Department	
1) Professionals	25%
2) Technicians	
Group III—Inspection Services Department	
1) Technicians (other than Building Inspector)	25%
2) Skilled Craft Workers	25%
Group IV—Traffic Engineering Department	
1) Technicians	25%
Group V—Office of Housing	
1) Professionals	25%

8. In order to correct the effects of any past underrepresentation of blacks in the Police and Fire departments of the City of Birmingham, and to further insure the achievement of the long term goal established by this Decree, the City shall, subject to the availability of qualified black candidates, promote at least two (2) blacks to the next four (4) lieutenant vacancies in the Police Department and shall promote at least one (1) black

to the next two (2) captain vacancies in the Police Department. The City shall, subject to the availability of qualified black candidates, promote at least one (1) black to the next two (2) captain vacancies in the Fire department. Thereafter, and until the long term goal of this Decree is met in the Police and Fire departments, the City shall seek to achieve the interim goals of promoting blacks to vacancies in lieutenant and captain positions in the Police Department and to vacancies in the positions of captain and battalion chief in the Fire Department at twice the black percentage representation in the job classifications from which promotional candidates are traditionally selected for those jobs.

B. Goals for Women

9a. In order to overcome the effects of any prior underrepresentation of women in the job classifications listed below and to correct for the effects of the Personnel Board's prior practice of restricting its job announcements in many of these positions to "males only", the City shall establish and attempt to meet an annual interim goal of making probational appointments of female applicants to vacancies in permanent, full-time positions in the classified service in the job groups listed below at the rates set forth next to each job group or at the rate of female representation among applicants, whichever is higher. Attached as Appendix B to this Consent Decree is a listing of each of the job classifications included within each of the job groups set forth in this paragraph.

Job Group	Interim Annual Goal
Group I—Police Department	25 %
Protective Services (Police Officer)	
Group II—Police Department	25 %
Protective Services (Police Sergeant)	
Group III—Fire Department	15 %
Protective Services	

Group IV—Engineering Department	30 %
Professionals	
Technicians	
Para-professionals	
Group V—Inspection Services Departments	20 %
Professionals	
Technicians	
Skilled Craft Workers	
Group VI—Municipal Garage	20 %
Skilled Craft Workers	
Service/Maintenance Workers	
Group VII—Office of Housing	20 %
Professionals	
Group VIII—Streets & Sanitation	20 %
Technicians	
Service/Maintenance Workers	
Group IX—Traffic Engineering	30 %
Professionals	
Technicians	
Skilled Craft Workers	
Service/Maintenance Workers	
Group X—Parks & Recreation	20 %
Skilled Craft Workers	
Service/Maintenance Workers	
Group XI—Parking Authority	30 %
Protective Services	

9b. With respect to promotions to sworn positions in the police department above the rank of sergeant, the City shall, subject to the availability of qualified female applicants, seek to insure that women are promoted to such positions in percentages which are approximately equivalent to their percentage

representation in the job classifications from which promotional candidates are traditionally selected.

C. Implementation of Goals

10a. In order further to insure the possibility of achieving the goals for blacks and women set forth in this Decree, the City shall request the Personnel Board selectively to certify to the City for appointment qualified blacks and females whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals set forth in this Decree. More specifically, in cases where candidates have been found unqualified or unavailable for appointment, the City shall request that the Personnel Board certify sufficient numbers of qualified blacks and women to meet the goals of this Decree. In this regard the City may request that the Personnel Board certify qualified blacks and females who are not incumbent employees of the City of Birmingham. In determining the City's compliance with the goals of this Decree, the appointment of a black female shall count toward both black and female hiring and promotion goals.

10b. In the event the Personnel Board declines, or is unable, to furnish lists containing qualified blacks or females, or in the event the Personnel Board declines to eliminate from its consideration of eligibles non-validated promotional potential ratings, the City, notwithstanding any state or local law, shall take whatever actions are required to comply with the terms of this Decree. Such actions may include, but are not limited to:

- (i) Directly recruiting blacks or females, for the purpose of supplementing any non-conforming list furnished by the Personnel Board.
- (ii) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

III. AFFIRMATIVE ACTION PLANS

11. On an annual basis for five years after entry of this Decree, each department of the City shall submit to the Office of the Mayor, in writing, an affirmative action plan designed to increase the employment and promotions of blacks and women in the respective department, and to otherwise promote the implementation of this Decree. The plan shall set forth the affirmative steps to be taken to increase the employment and upgrading of blacks and women.

12. A copy of the affirmative action plan for each department, when approved by the Mayor, shall be posted in a conspicuous and prominent place in the main office of each department of the City, and a copy of each plan shall be prominently posted by the Director of Personnel in a public area in City Hall.

13. Each department head shall submit to the Mayor semi-annual evaluation reports of the department's affirmative action plan. The report shall also include a review of the department's progress in achieving the specific goals of this Decree and of the department's affirmative action plan, noting the goals which were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure.

IV. RECRUITMENT

14. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform blacks and women of job opportunities with the City for the purpose of securing sufficient qualified applicants to enable the City to meet the hiring goals set forth herein. The recruitment program shall include maintaining contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities with the City. In addition, where appropriate, advertising of employment opportunities shall be placed with or in advertising media primarily directed to black and female

audiences for the purpose of emphasizing to blacks and women the availability of employment opportunities with the City. As part of its recruitment program the City shall utilize black and female recruiters for the Police and Fire Departments.

V. JOB POSTING

15. The City shall inform its employees of all opportunities for promotion or transfer. The City shall insure that all written announcements received from the Personnel Board for hiring, promotion and training opportunities with the City are made available to all of its employees reasonably in advance of any scheduled examinations or training for such positions. Such announcements shall be posted in conspicuous places so that reasonable notice is given to the City's employees of such employment opportunities.

16. Notices of vacancies within a department in either permanent, part-time or temporary positions shall be posted separately and in conspicuous places from notices of vacancies in other departments. With respect to promotions and/or training opportunities in the Police, Fire, and Streets and Sanitation departments, the City shall insure that written notification of promotion or training opportunities in jobs in those departments are contained on separate bulletin boards and in conspicuous places at each precinct, fire house or division of such departments. The City shall also seek to insure that such announcements remain on the bulletin board for the specified period of time, and that they are not taken down or otherwise tampered with by unauthorized persons.

VI. SEX RESTRICTIONS IN JOB ANNOUNCEMENTS AND CERTIFICATIONS

17. The City shall not request that the Personnel Board restrict any job announcements or certifications on the basis of sex except where, pursuant to a proper validation study, gender is determined to constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII for the job(s) listed in such announcements or certifications, and such determination is approved in writing by the United States. If such approval is not granted, the City reserves the right upon

proper motion to petition the Court for approval of the determination.

VII. HEIGHT-WEIGHT REQUIREMENTS

18. The City shall not use or follow any minimum height or weight requirements which have an adverse impact against blacks or women as selection criteria for any classified service position, nor shall it abide by any such requirements if they are instituted and administered by the Personnel Board.

VIII. ELIGIBILITY TO APPLY FOR PROMOTION TO CERTAIN JOBS

19a. The City shall not require police officers to serve more than three years uninterrupted service in rank (or two years uninterrupted service in rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant, nor shall it require police sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant. Employees who have obtained permanent status as police lieutenant shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

19b. The City shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

19c. For purposes of subparagraphs a and b the term "uninterrupted" service shall include any time spent as a probationary employee.

20. In order to be eligible to take the promotional examinations for the positions of public works supervisor or construction supervisor, an employee must have permanent status as a truck driver, refuse truck driver, labor supervisor, heavy equipment operator or construction equipment operator. In

order to be eligible to take the promotional examination for the position of sanitation inspector, an employee must have permanent status as a truck driver or semi-skilled laborer.

21. Any employee who has worked full-time in an unclassified laborer position for twelve consecutive months shall be eligible to apply to take the promotional examinations for the following classifications: semi-skilled laborer, truck driver, refuse truck driver, equipment service worker, automotive mechanic helper. As used in this paragraph, the term laborer shall include the classification of building service worker, laborer, and refuse collector.

22. Any employee who has obtained permanent status as a semi-skilled laborer or truck driver shall be eligible to apply to take the promotional examinations for the following classifications: truck driver, refuse truck driver, labor supervisor, heavy equipment operator, equipment service worker, automotive mechanic helper.

23. Any employee who has obtained permanent status as a truck driver, heavy equipment operator, refuse truck driver, or labor supervisor shall be eligible to apply to take the promotional examination for the classification of construction equipment operator.

IX. PROMOTIONAL POTENTIAL RATINGS

24. The City may continue to use the Personnel Board's current promotional potential rating system in departments where it is shown to have no adverse impact. The City shall discontinue the use of the Personnel Board's current promotional potential rating system in the following departments in which departments such ratings have been demonstrated to have had an adverse impact on blacks: Streets and Sanitation, Police, Fire, Parks and Recreation.

25. The City further agrees to discontinue the use of the Personnel Board's current promotional potential rating system to determine eligibility for promotion in any other department where, based upon any two successive rating cycles (one cycle consisting of 6 months), there is evidence of adverse impact against blacks. In determining adverse impact under this sub-

part the parties agree to rely upon Section 4D of the *Uniform Guidelines*.

X. BACKGROUND INVESTIGATIONS

26. Background investigations shall be conducted in such a manner so as not unlawfully to discriminate on the basis of race or sex. Applicants for employment shall not be disqualified automatically on the basis of an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating. In considering the effect of a criminal conviction upon an applicant's qualifications, the City shall consider at least the following factors: (1) the nature of the position the applicant is seeking; (2) the nature of the crime; (3) the period of time elapsed since the conviction; and (4) the success or failure of rehabilitation efforts.

27. The City shall establish a written policy concerning background investigations within the Police Department within 90 days after this Decree is entered. As part of that policy, the Police Department shall provide applicants who have been rejected on the basis of the background investigation written notice of the specific reason(s) for their rejection. An applicant who has received such notice shall be allowed ten (10) days to respond orally or in writing and to provide relevant information concerning the basis for rejection. The City shall insure that such oral or written response and relevant information is reviewed by an individual(s) who did not participate in the applicant's initial background investigation, and that this review shall occur before the rejection becomes final. The Department's background investigation policy shall be reviewed periodically to insure that it is administered in a non-discriminatory manner, and that any components, aspects or elements of the background investigation process which result in a disproportionate disqualification of blacks or women are either eliminated or shown to be job related in accordance with the requirements of the *Uniform Guidelines*. The policy shall also provide that any black or female applicant rejected for a job by reason of an adverse background investigation shall be replaced on the next certification list for such job by an applicant of the same race or gender.

XI. SUPERVISORY INSTRUCTION

28. The City shall inform supervisory personnel that the City shall not discriminate against or harass any employee or potential employee on the basis of race or sex. In addition, the City will instruct such personnel about their responsibility in regard to equal employment opportunity and affirmative action. Supervisory personnel will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the Affirmative Action Officer.

XII. DISMISSALS FROM THE POLICE AND FIRE TRAINING ACADEMIES

29. The City agrees that prior to the dismissal of a black or female from the police or fire training academy, it shall notify any such black or female in writing of the specific reason(s) that person is subject to dismissal from the academy, and he or she shall be given an opportunity to respond orally or in writing within 10 days to responsible training academy officials with respect to any matters which concern their academy performance. Copies of any correspondence, notes, memoranda or recordings concerning any matters covered by this paragraph shall be retained by the City and shall be available for inspection by attorneys for the plaintiffs upon request.

XIII. FACILITIES

30. The parties recognize that the City has engaged and is continuing to engage in affirmative efforts to eliminate vestiges of racial segregation in employees' facilities. The City hereby agrees to take steps to insure that such facilities will be maintained in a racially integrated fashion in the future.

XIV. AFFIRMATIVE ACTION OFFICER

31. The City shall appoint an Affirmative Action Officer who shall have the following responsibilities:

(a) Advise black and female employees of the terms of this decree;

(b) Post his or her office hours and location and copies of this Decree in conspicuous places within each department or operational unit of the City;

(c) Receive and investigate complaints of race and sex discrimination and conciliate such complaints when appropriate, and notwithstanding any other provisions of law, establish a written procedure which shall govern such complaints;

(d) Maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to or from the City of Birmingham with respect to any complaints or investigations undertaken pursuant to this Consent Decree and any investigatory files; and

(e) To review, prior to final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are underrepresented. The Affirmative Action Officer shall submit his or her written comments together with the appointing authority's written justification to the Office of the Mayor, prior to final selection.

XV. AFFIRMATIVE ACTION COMMITTEES

32. The City shall appoint separate affirmative action committees for the Police Department, the Fire Department, and the Streets and Sanitation Department. Each committee shall be composed of not less than 3 nor more than 5 members who are City employees, and who may be either incumbents in their respective departments or individuals selected from outside such departments. Such committees shall meet periodically to review the job assignment and disciplinary policies in their respective departments in order to insure that such policies are maintained and administered in a manner that does not unlawfully discriminate against any employee because of race or sex. Such committees shall report quarterly (or more than quarterly if required by specific matters) to the mayor or his designee. In appointing the members of such committees the City shall insure that there are at least two blacks and one female among the

members of each such committee. Each committee member shall be compensated for committee work at the same rate the committee member receives in his or her job with the City.

XVI. INDIVIDUAL RELIEF

A. Relief for Named Private Plaintiffs

33. The individual named plaintiffs in the *Martin* case, (filed on January 7, 1974) are John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard. The City of Birmingham agrees to provide the following relief for the named plaintiffs in the *Martin* case, without awaiting any further action by the Personnel Board.

a. Ida McGruder alleged in the complaint in the *Martin* case that the City of Birmingham discriminated against her on the basis of race in failing to hire her to a position as a key punch operator after she was certified to that position as qualified by the Personnel Board on several occasions in 1973. The position of key punch operator is now known as data entry operator. The City of Birmingham agrees to hire Ida McGruder to the first data entry operator vacancy which occurs after the final approval of this Decree by this Court. Ms. McGruder's remedial City seniority date and adjusted classification seniority date shall be May 1, 1973. Ms. McGruder shall also receive back pay relief as provided in paragraph 34a of this Decree. At the time Ms. McGruder fills a data entry operator vacancy with the City, she shall be paid at the highest pay step for that classification.

b. Major Florence claims he was discriminated against on the basis of race in that he has been denied promotional opportunities in the Streets and Sanitation Department by the City and the Personnel Board. The City agrees to promote Mr. Florence to the position of public works supervisor as provided in paragraph 47a and Appendix C of this Decree. Mr. Florence's adjusted classification seniority date for public works supervisor shall be June 3, 1974. Mr. Florence shall also receive back pay relief as provided by paragraph 34a of this Decree.

c. Sam Coar alleged in the complaint that he was discriminatorily discharged from the Streets and Sanitation Department of the City of Birmingham in 1972 after 8 years of employment as an unclassified laborer. The City of Birmingham agrees to hire Sam Coar to a position as a truck driver in the Streets and Sanitation Department for the first truck driver vacancy which occurs after final approval of this Consent Decree by this Court. At the time Mr. Coar fills a truck driver vacancy with the City, he shall be paid at the highest step for that classification. Mr. Coar's remedial city seniority date shall be March 3, 1964, the date Mr. Coar entered the unclassified service of the City of Birmingham. Mr. Coar's adjusted classification seniority date for truck driver shall be January 1, 1973. Mr. Coar shall also receive back pay relief pursuant to paragraph 34a of this Decree.

d. Eugene Thomas alleged in the complaint that he was denied a position as a police officer with the City of Birmingham because of race. The City of Birmingham agrees to hire Mr. Thomas for the first police officer vacancy which occurs after final approval of this Decree, provided that Mr. Thomas satisfactorily passes the standard physical examination for the police officer position. Mr. Thomas shall also receive back pay relief as provided in paragraph 34a of this Decree. Mr. Thomas' remedial city seniority and adjusted classification seniority shall date from July 1, 1973. At the time Mr. Thomas fills a police officer vacancy with the City under this Decree, he shall be paid at the highest pay step for that classification.

e. John W. Martin alleged in the complaint that he was rejected for the position of security guard with the City of Birmingham because of race, after he had been certified by the Personnel Board as qualified for that position. Mr. Martin was subsequently hired by the City of Birmingham in another position. Mr. Martin shall receive back pay relief as provided in paragraph 34a of this Decree, but waives any claim to any other individual relief.

f. Charles Howard alleged in the complaint that he was denied a position as a firefighter with the City of Birmingham because of the racially discriminatory firefighter test. Mr. Howard shall receive back pay relief as provided in

paragraph 34a of this Decree, but waives any claim to any other relief.

g. Wanda Thomas claims she was discriminated against by Jefferson County, not by the City of Birmingham. She therefore does not seek any relief against the City of Birmingham.

Each of the individual named plaintiffs, with the exception of Wanda Thomas, agrees to sign the release contained in Appendix E of this Decree. The plaintiffs do not waive any claims they may have for monetary relief or any other relief to which they may be entitled against any other defendants in these or any other actions.

B. Back Pay and Other Individual Relief In The Actions Brought By the United States and Private Plaintiffs

34. The City agrees to pay the sum of \$265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions. Any back pay awards to be made from such sum shall be subject to income tax withholding and the employee's share of social security. Within sixty-five (65) days after provisional approval of the Consent Decree by the District Court, or final approval of the Decree by the Court, whichever occurs first, the City agrees to pay the sum of \$265,000 in full and complete settlement of the claims against the City of Birmingham for monetary relief in these consolidated actions. This sum shall be deposited in separate trust accounts bearing interest at the commercial rates as follows:

a. A fund in the total amount of \$30,000 shall be set aside for the individual private plaintiffs referred to in paragraph 33. Within ten (10) days after the date this Decree is given final approval by the Court, the Clerk shall pay the following amounts to the following named plaintiffs, together with the interest accrued thereon.

Major Florence	\$8,500
Ida McGruder	\$6,500
Sam Coar	\$6,500
Eugene Thomas	\$4,000
John Martin	\$3,500
Charles Howard	\$1,000

These amounts shall be in full satisfaction of all claims of the named plaintiffs for monetary relief against the City of Birmingham in these consolidated actions including claims they may have as members of any of the subclasses.

b. A fund in the total amount of \$5,000.00 shall be set aside for the members of Subclass No. 1 in Appendix C (the Police and Fire test subclass). Members of this subclass shall also be eligible for back pay relief under the Personnel Board Decree.

c. A fund in the total amount of \$65,000.00 shall be set aside for the members of Subclass No. 2 in Appendix C (the Unclassified Service subclass).

d. A fund in the total amount of \$137,000.00 shall be set aside for the members of Subclass No. 3 in Appendix C (the Streets and Sanitation promotional subclass).

e. A fund in the total amount of \$6,000.00 shall be set aside for the members of Subclass No. 4 (the Policewomen subclass).

f. A fund in the total amount of \$22,000.00 shall be set aside for the members of Subclass No. 5 (the Rejected Applicant subclass).

The amounts described in paragraphs b through f above, together with the interest accrued thereon, shall be paid to members of the appropriate subclasses as described in Appendix D. Payments from these separate funds shall be pursuant to Court order.

35. The amount of back pay relief allocated for each subclass listed in Appendix C has been determined by a calculation of the relative economic injury suffered by each of the subclasses. The amount of individual back pay relief for subclass members will be determined as described in Appendix D after the individual subclass members submit proof of claim forms in accordance with the provisions of paragraph 36 below.

36. Within ten (10) days after the Court gives final approval to the Consent Decree, written notice will be given by

the City by certified mail, return receipt requested, to each of the members of the subclasses identified in Appendix C. Notice to such individuals will be sent to their last known address. The form of the notice is attached as Appendix G. Proof of claim forms (attached as Appendices H through L) will be included with the individual notice to class members. Each subclass member shall have sixty (60) days from the date of mailing to respond to this notice and to file his or her proof of claim form with the Clerk of the Court.

37. Within forty-five (45) days after receipt of all timely proof of claim forms, counsel for the plaintiffs will submit to the Court and counsel for the City a report listing each subclass member who, in their view, is entitled to participate in the individual relief provisions of this Consent Decree. In preparing this report counsel for the plaintiffs shall be allowed access to the City's records and files after reasonable notice of no less than three (3) days, and any review of such records and files shall occur during normal working hours. Plaintiffs shall include a description of the job offer and remedial seniority, if any, to be offered by the City to the subclass member and the monetary relief, if any, to be afforded by the City to such person. In no event will the sum of the individual monetary awards to be paid by the City of Birmingham to the members of the subclasses identified in Appendix C, and to individual private plaintiffs identified in paragraph 33, exceed the sum of \$265,000, plus any interest accrued thereon.

38. The City shall have ten (10) days from receipt of the plaintiffs' report on individual relief to notify, in writing, counsel for the plaintiffs of any objection(s) it may have to the job offer and/or seniority dates for the individuals identified in such report. If there is any such objection(s), the parties shall first attempt to reach a voluntary resolution of the matter(s). In the event the parties are unable to resolve such objection(s), they may petition the court for a resolution of such objection(s). The City agrees not to challenge any of the individual back pay awards to be made under this Consent Decree.

39. Remedial City seniority date, as that term is used in this Decree, shall mean the employee's seniority for purposes of promotion, vacation as accrued, sick leave, and longevity

pay, but such date shall not be utilized for pension purposes. However, employees with remedial City seniority dates may elect, if state law permits, to pay into the City's pension system the amount of money the employee would have paid into the system had such employee been in active uninterrupted service with the City from such remedial date. Such election must be made and the required sum of money paid into the pension fund within six (6) months after the date the employee enters the City's service under the provisions of this decree or, in the case of current City employees, within six (6) months of their being notified that the Court has given final approval to their remedial seniority rights under this Decree. Adjusted classification seniority, as that term is used in this Decree, shall mean the employee's seniority for layoff and recall in the jobs to be offered to individuals under Part XVI of this Decree.

40. Upon final determination of the awards of individual relief to be made under this Decree, the City of Birmingham shall within five (5) days thereafter notify by certified mail each of the subclass members who filed a timely request to be considered for individual relief of their proposed awards of relief, if any, as set forth in the plaintiffs' report submitted to the Court. This notice shall also inform each of these individuals of their right to object to the relief, if any, as contained in the report, and that they must file their objections in writing with the Clerk of the Court within fifteen (15) days of their receipt of this notice.

41. If any such objections are filed, the Court shall thereafter, and as soon as practicable, schedule a hearing at which it will rule upon any objections to the report which have been timely filed. At the conclusion of such hearing the Court shall determine whether to give final approval or disapproval to the awards of individual relief.

C. Implementation of Individual Relief

42. Immediately upon final approval by the Court of the awards of individual relief for subclass members to be made under this Decree, the City will begin to implement part XVI of this Decree as described herein. However, the City shall im-

plement the relief for the named private plaintiffs as provided in paragraphs 33(a) through 33(f) of this Decree.

43. Any person entitled to individual relief (including the named private plaintiffs), in order to obtain such relief, must sign a notarized release which will be provided that person by the City (Appendix E) and return such notarized release to the City within thirty (30) days of that person's receipt thereof. Any such individual who either does not sign such notarized release or, alternatively, and absent good cause, does not return such signed notarized release to the City within thirty (30) days of that person's receipt thereof shall be deemed to have waived his or her entitlement to such relief. Such release shall provide that the relief to which that person is entitled under part XVI of this Decree, if accepted, shall be in full and final settlement of any and all claims against the City of Birmingham based upon allegations of race or sex discrimination occurring prior to the date such release is signed. Such release shall be in the form exemplified by Appendix E attached hereto, or such other form upon which the plaintiffs and the City may agree and the Court approve.

44. The City of Birmingham shall send a notice to each of the subclass members entitled to individual relief informing them that the Court has given final approval to their right to such relief under this Decree. This notification shall be in writing, be made by certified mail, return receipt requested, and shall be approved as to substance and form by the plaintiffs prior to mailing. Included with such notice will be a copy of this Decree and the release form as described in paragraph 43 above. With respect to those individuals who are eligible for consideration to fill a future vacancy in a classified service position, the notice shall clearly and specifically inform such persons of the qualification requirements they will have to meet in order to be appointed to that position. Such notification also shall state that if the recipient has any questions above the notice, he or she may contact the Affirmative Action Officer, the Director of Personnel for the City or counsel for the plaintiffs whose names, addresses and phone numbers shall be listed in the notice, or their own counsel.

45. As the City receives releases from the named private plaintiffs and subclass members entitled to a back pay award under this Decree, it shall apply to the Court for Orders directing the Clerk of the Court to issue checks to such persons in the amount of his or her back pay award.

46. Subject to the provisions of paragraph 47a, each of the persons who are determined to be entitled to an offer of employment with the City pursuant to the plaintiffs' report as set forth in paragraph 37, shall be entitled to priority appointments to future vacancies in such positions in the order provided in plaintiffs' report.

47a. The individuals named in Appendix C as members of subclass 3 are blacks who the parties have already determined are entitled to priority promotional opportunities in the Streets and Sanitation Department. Immediately upon final approval of this Consent Decree by the Court, those individuals shall be deemed by the City to be qualified for promotion to the jobs listed next to their names in the Appendix. The City agrees to promote these individuals to the first permanent full time vacancies which occur in the job listed next to their names after the Court grants final approval to this Decree. Where two or more persons named in this subclass are entitled to fill a future vacancy in the same position, priority of appointments shall be determined by the date of hire seniority dates listed next to their names in that Appendix.

47b. Except for the individuals who are named as members of subclass 3 in Appendix C who are eligible for priority promotional opportunity in the Streets and Sanitation department, each individual entitled to a job offer under this Decree and pursuant to the plaintiffs' report shall be required satisfactorily to demonstrate his or her qualifications for the job to be offered in accordance with the current qualification requirements for the job as established by the City and the defendant Jefferson County Personnel Board, provided that such requirements are administered in a nondiscriminatory manner, do not unlawfully discriminate either in purpose or effect against blacks or women, and do not otherwise conflict with the provisions of paragraph 1 of this Decree. The City agrees to waive any age requirements which may currently bar any such

individual from obtaining employment with the City if such individual met such age requirements at the time of application. No such class member shall be required to pass any test or meet any other qualification standard which has been shown to have adverse impact on blacks or women.

XVIII [SIC]. NOTICE AND FAIRNESS HEARING

48a. Within ten (10) days after provisional approval of this Consent Decree by the Court, notice, in the form attached as Appendix F-1, will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one weekday directed to all interested persons informing them of the general provisions of this Decree and of their right to review a copy of the Decree which will be on file with the Clerk of the Court. Within this same ten (10) day period, individual notice will also be given of the general provisions of this Decree by the City to the subclasses identified in Appendix C. The cost of mailing and publication of any notices to be made under this Decree shall be paid by the City. The form of this notice is attached as Appendix F-2. Both notices by publication and the individual notices shall inform persons to whom such notices are directed of their right to be heard and to file objections, if any, to this Decree. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Decree. The Court shall thereafter, and on a date(s) to be fixed by the Court in its Order granting provisional approval to the Decree, schedule a fairness hearing at which those persons who file timely objections to the Decree will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final approval or disapproval to this Consent Decree. The Court shall, however, withhold final approval of the awards of individual relief to be made under this Decree, except the relief to be granted the individual named plaintiffs in the *Martin* case and the offers of promotion to be made to individuals named in Appendix C, until those class members who file a timely response to the notice of right to present a claim for relief under paragraph 36 above, are notified of their individual awards, if

any, and are afforded an opportunity to be heard and to file any objections they may have to those awards.

48b. In the event there are objections to the Consent Decree which the Court overrules, the Court shall not implement the Decree until thirty days after the entry of an Order finally approving the Decree.

XVIII. RECORDKEEPING

49. The City shall retain during the period of this Decree necessary records concerning the implementation of this Decree. These records shall be made available to the plaintiffs for inspection and copying upon written request.

50. The City's records shall include the following:

(a) A list of all organizations and schools which are contacted for recruitment purposes, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that notice, and the date through which applications could be received for the job which was advertised, including a summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of the City's employees who made the contact and the nature of the contact.

(b) All written applications and related records for all persons seeking employment with the City, including applications for transfer or promotion within or among departments, for a period of at least five (5) years, and shall include on such applications identification of the applicant by race and sex. Such records shall also contain a statement of the reasons why any applicant was found not to be qualified for the position(s) applied for.

(c) With respect to any applicant who is certified for hire or promotion and who is not selected for the vacancy for which that applicant is certified, the City shall record in writing the reason(s) for the applicant's not being selected for that vacancy. Also, the City shall record and maintain any other written records or com-

ments on an applicant for certification in accordance with paragraph 31(e) above.

(d) All written communications between the City and applicants for employment, transfer and promotion.

(e) All written communications between the City and employees concerning discipline and discharge, as well as all written reports concerning these matters.

XIX. REPORTING

51. Within ten days after adoption of the City's annual affirmative action plans and reports for each department, the City shall furnish a copy of every plan and report to the plaintiffs.

52. Within 60 days of the entry of this decree and thereafter semi-annually, the City shall report to the plaintiffs, the following information:

(a) A summary showing the total number of employees by race and sex in each job classification for each department of the City in both the classified and unclassified service.

(b) A list of all probational appointments for permanent full-time positions, by job classification and department, during the reporting period indicating the race and sex of the persons hired or promoted.

53. Within 60 days of the entry of this Decree and thereafter on an annual basis, the City shall report to the plaintiffs the following information:

(a) A list of all persons, by job classification, department, race and sex, to whom positions have been offered and whether or not the positions were accepted.

(b) A list of all promotions to permanent full-time positions in the classified service, by job classification and department, during the reporting period indicating the race, sex, date of initial hire in the classified service and date of the promotion.

(c) A breakdown of the applicant flow for employment with the City which indicates by race and sex the number of applicants for each department and job classification in the classified and unclassified service, and the number of applicants hired, rejected and pending for each job classification and department. Applicant hires shall be separately identified as to Comprehensive Employment Training Act (CETA) positions.

(d) A summary report of the recruiting activities conducted by the City and the results of those activities.

(e) A report of the City's implementation of the individual relief provisions of this Decree. This report shall include a statement of the monetary payments, if any, that have been made to individuals entitled to such relief. This report shall further identify each individual who has been offered a job with remedial seniority under this Decree, and whether the job offer was accepted or rejected. For any individual who was disqualified from an offer of employment under Part XVI of this decree, a specific statement of the reasons for disqualification shall be included in this report.

(f) A list of the sworn personnel terminated from either the Police Department or the Fire Department, identifying each individual by race, sex, date of hire, date of termination, probational or permanent status, and rank. In addition, the report shall explain the reason each individual was terminated.

(g) Within thirty (30) days of establishment or revision, a copy of the written policy concerning background investigations required by paragraph 27.

XX. EFFECT OF COMPLIANCE

54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and

1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

XXI. RETENTION OF JURISDICTION

55. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after six (6) years subsequent to the date of the entry of the Consent Decree, any party may move the Court upon forty-five (45) days notice to the other, to dissolve this Consent Decree. In considering whether the Consent Decree shall be dissolved, the Court will take into account whether the purposes of this Consent Decree have substantially been achieved.

Entered and Ordered this ____ day of _____, 1981.

UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

For Plaintiff United States

DATED:

/s/ Richard J. Ritter

May 19, 1981

For the Plaintiffs in *Martin, et al.*
v. City of Birmingham, et al.

/s/ Susan W. Reeves/ Stephen L. Spitz

May 19, 1981

For the Plaintiffs in *Ensley Branch*
of the N.A.A.C.P., et al. v. Seibels, et al.

/s/ Oscar W. Adams, III

May 19, 1981

For the Defendant City of Birmingham

/s/ James K. Baker

May 19, 1981

Appendix A

Group I - Engineering Department

1. Professionals: (1) Graduate Engineer
(2) Sr. Graduate Engineer
(3) Airplane Fac. Engineer
(4) Sr. Civil Engineer
(5) Chief Civil Engineering
(6) Chief Design Engineering
2. Technicians: (1) Civil Engineer
(2) Engineering Technician
(3) Sr. Engineering Technician
(4) Chief of Party
(5) Engineering Inspector
(6) Sr. Engineering Inspector
(7) Construction Cost Analyst
(8) Media Spec.
(9) Engineering Drafter
(10) Sr. Engineering Drafter
(11) Sr. Row Agent

Group II - Finance Department

1. Professionals: (1) Sr. Auditor
(2) Sr. Accountant
(3) Principal Accountant
(4) Chief Accountant
(5) Accountant
(6) Auditor
(7) Revenue Examiner

Group III - Inspection Services Department

1. Technicians: (1) Maintenance Mechanic
(other than (2) Electrical Inspector
Building (3) Chief Electrical Inspector
Inspectors) (4) Elevator Inspector
(5) Chief Elevator Inspector

Appendix A Cont'd.

- (6) Plumbing Inspector
- (7) Gas Inspector
- (8) Chief Pl/Gas Inspector
- (9) Chief Building Inspector
- (10) Zoning Inspector
- (11) Weights & Measures Inspector
- (12) Sr. Weights & Measures Inspector

- 2. Skilled Craft Worker:
 - (1) Maintenance Mechanic
 - (2) WWTF Maintenance Worker
 - (3) Cabinet Maker
 - (4) Plumber
 - (5) Refrigerator & Heating Mechanic
 - (6) Painter
 - (7) Painter Supervisor
 - (8) Electrician

Group IV - Traffic Engineering Department

- 1. Technicians:
 - (1) Traffic Planning Technician
 - (2) Sr. Traffic Planning Techniciaan
 - (3) Traffic Analyst
 - (4) Traffic Construction Supervisor
 - (5) Supv. of Traffic Construction Supervisor
 - (6) Traffic Operators Supervisor
 - (7) Street Light Inspector

Group V - Office of Housing

- 1. Professionals:
 - (1) Housing Rehabilitation Specialist
 - (2) Sr. Housing Rehab.
 - (3) Pr. Housing Rehab.
 - (4) Housing Relocation Officer

Appendix B**Group I - Police Department**

- 1. Protective Service: (1) Police Officer

Group II - Police Department

- 1. Protective Service: (1) Police Sergeant

Group III - Fire Department

- 1. Protective Service:
 - (1) Firefighter
 - (2) Fire Prevention Inspector
 - (3) Fire Communications Operator

Group IV - Engineering Department

- 1. Professionals:
 - (1) Graduate Engineer
 - (2) Sr. Graduate Engineer
 - (3) Airplane Fac. Engineer
 - (4) Sr. Civil Engineer
 - (5) Chief Civil Engineering
 - (6) Chief Design Engineering
- 2. Technicians:
 - (1) Civil Engineer
 - (2) Engineering Technician
 - (3) Sr. Engineering Technician
 - (4) Chief of Party
 - (5) Engineering Inspector
 - (6) Sr. Engineering Inspector
 - (7) Construction Cost Analyst
 - (8) Media Spec.
 - (9) Engineering Drafter
 - (10) Sr. Engineering Drafter
 - (11) Sr. Row Agent

Appendix B. Cont'd.**3. Para-Professionals:**

- (1) Engineering Aide
- (2) Sr. Engineering Aide

Group V - Inspection Services Department**1. Professionals:**

- (1) Architect
- (2) Architect Drafter
- (3) Plans Examiner
- (4) Zoning Coordinator

2. Technicians:

- (1) Communications Technician
- (2) Electrical Inspector
- (3) Chief Electrical Inspector
- (4) Elevator Inspector
- (5) Chief Elevator Inspector
- (6) Plumbing Inspector
- (7) Gas Inspector
- (8) Chief Pl/Gas Inspector
- (9) Building Inspector
- (10) Chief Building Inspector
- (11) Zoning Inspector
- (12) Weights & Measures Inspector
- (13) Sr. Weights & Measures Inspector

3. Skilled Craft**Worker:**

- (1) Maintenance Mechanic
- (2) Auto Mechanic
- (3) WWTF Maintenance Worker
- (4) Cabinet Maker
- (5) Plumber
- (6) Plumber
- (7) Painter
- (8) Painter Supervisor
- (9) Electrician

Appendix B. Cont'd.**Group VI - Municipal Garage****1. Skilled Craft****Worker:**

- (1) Auto Mechanic
- (2) Auto Shop Supervisor
- (3) Auto Repair Expert

2. Service/Main-**tenance****Worker:**

- (1) Service Station Attendant
- (2) Equipment Service Worker
- (3) Sr. Equipment Service Worker
- (4) Auto Mechanic Helper
- (5) Building Service Worker
- (6) Laborer

Group VII - Office of Housing**1. Professionals:**

- (1) Housing Rehabilitation Specialist
- (2) Sr. Housing Rehab.
- (3) Pr. Housing Rehab.
- (4) A/HCUS Rehab. Officer
- (5) Housing Relocation Officer

Group VIII - Streets & Sanitation**1. Technicians:**

- (1) Sanitation Inspector
- (2) Sr. Sanitation Inspector
- (3) Street Paving Spec.

2. Service Main-**tenance****Worker:**

- (1) Driver Messenger
- (2) Dist. Sit. Attn.
- (3) Truck Driver
- (4) Semi-Skilled Laborer
- (5) Shop Helper
- (6) Guard
- (7) Building Service Worker
- (8) Laborer
- (9) Refuse Collector

Appendix B. Cont'd.**Group IX - Traffic Engineering**

1. Professionals: (1) Traffic Systems Engineer
(2) Sr. Traffic Systems Engineer
2. Technicians: (1) Traffic Planning Technician
(2) Sr. Traffic Planning Technician
(3) Traffic Analyst
(4) Traffic Control Supervisor
(5) Supv. Traffic Control Supervisor
(6) Traffic Opns. Supervisor
(7) Street Light Inspector
3. Skilled Craft Worker: (1) Traffic Signals Markings Worker
(2) Traffic Signals Markings Crew Leader
(3) Laborer
4. Service/Maintenance Worker: (1) Traffic Signs, Signals & Markings Worker
(2) Traffic Signs, Signals & Markings Crew Leader

Group X - Parks & Recreation

1. Skilled Craft Worker: (1) Maintenance Mechanic
(2) Park Maintenance Supervisor
(3) Park Maintenance Supt.
(4) Mason
(5) Carpenter
(6) Plumber
(7) Painter
(8) Sign Painter
(9) Painter Supervisor
(10) Electrician

Appendix B. Cont'd.

2. Service/Maintenance Worker: (1) Zookeeper
(2) Truck Driver
(3) Semi-Skilled Laborer
(4) Shop Helper
(5) Stadium Maintenance Supervisor
(6) Greenhouse Worker
(7) Gardener
(8) Landscape Supervisor
(9) Hort. Dist. Supv.
(10) Guard
(11) Maintenance Repair Worker
(12) Laborer
(13) Refuse Collector

Group XI - Parking Authority

1. Protective Service: (1) Security Officer

APPENDIX C

Subclass No. 1

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers in the City of Birmingham which were in effect between April 25, 1975, and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer or firefighter positions by the City of Birmingham or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by the City of Birmingham but who may have been hired earlier but for their rank on such eligibility lists.

Subclass No. 2

All blacks who prior to the entry of this Decree were hired and assigned to laborer positions in the unclassified service of the City of Birmingham who, at any time after March 24, 1972, worked as laborers in the unclassified service and who prior to the entry of this Decree, were reclassified into the classified service. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree:

Birmingham Streets and Sanitation Department

- | | |
|----------------------|------------------------|
| 1. James Addie | 14. Melvin Harris |
| 2. Burnice Anthony | 15. Emmitt Hicks |
| 3. Willie Allen | 16. Adam Horne |
| 4. Johnnie Bridges | 17. David Horton |
| 5. Johnny Brown | 18. James Hudson |
| 6. Eugene Carlton | 19. Alex Huggins |
| 7. Elmo Carter | 20. Bruno Huggins, Jr. |
| 8. John Carter | 21. Norman Jackson |
| 9. Herman Copes | 22. Houston Kennedy |
| 10. Otis Dickerson | 23. Curtis W. King |
| 11. John Foster | 24. Avance Lomax |
| 12. Rickey K. Graham | 25. James Lowery |
| 13. Roy Harris | 26. Robert Lowery |

- | | |
|-----------------------|----------------------|
| 27. Carl E. Morris | 36. Gus Smith |
| 28. Elbert Muse | 37. Jessie Staten |
| 29. Trennon Nickerson | 38. Otis Taylor |
| 30. Henry Paige | 39. Winston Thomas |
| 31. Earnest Perry | 40. Wilson Tucker |
| 32. Sammie Robinson | 41. Morris Weatherly |
| 33. Edgar Sanders | 42. Willie Wells |
| 34. Anthony Scales | 43. Richard Whitaker |
| 35. James Shuford | 44. I.C. Williams |

Birmingham Traffic Engineering

- | | |
|--------------------|--------------------------|
| 45. Larry W. Belle | 50. Antonia J. Slaughter |
| 46. Darryl Cobb | 51. Lee Walker |
| 47. Andrew Davis | 52. John Webb |
| 48. John Rancher | 53. Larry Webb |
| 49. Henry Ray | |

Birmingham Municipal Garage

- | | |
|----------------------|----------------------|
| 54. Andrew L. Goodin | 57. Bobby J. Thomas |
| 55. Charlie James | 58. Wilbert Williams |
| 56. Fred Powell | |

Birmingham Parks and Recreation

- | | |
|----------------------|-------------------------|
| 59. D.C. Banks | 63. Melvin Webb |
| 60. Calvin Davis | 64. Herman Z. Whitehead |
| 61. David S. Handley | 65. Caldwell Wright |
| 62. Augusta L. Jones | |

Birmingham Building Maintenance

66. Abe Riggins, Jr.

Birmingham Fire Administration

67. John H. Hutchings

Subclass No. 3

All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Bir-

mingham at any time after March 24, 1972. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

Name	Date of Hire	Job
1. Charles Jordan	03/10/76	Construction Equipment Operator
2. Trennon Nickerson	09/15/66	Construction Equipment Operator
3. Roosevelt Parker	06/01/72	Construction Equipment Operator
4. Mose Shine, Jr.	04/24/67	Construction Equipment Operator
5. Charles Boyd	12/03/63	Labor Supervisor
6. Herman Copes	04/21/60	Labor Supervisor
7. Avance Lomax	06/29/70	Labor Supervisor
8. Samuel Bandy	12/28/61	Public Works Supervisor
9. A. B. Campbell	04/03/71	Public Works Supervisor
10. Willie Cargill	04/02/66	Public Works Supervisor
11. Major Florence	12/26/68	Public Works Supervisor
12. Willie Gossum	03/22/72	Public Works Supervisor
13. Clyde Hill	05/12/61	Public Works Supervisor
14. Arthur Jones	12/23/71	Public Works Supervisor
15. Cleo Lewis	12/27/71	Public Works Supervisor
16. Alfred Menfield	04/05/74	Public Works Supervisor
17. Orman Skinner	11/17/69	Public Works Supervisor
18. James Parker, Jr.	10/18/60	Refuse Truck Driver
19. Charlie Simmons	07/02/73	Refuse Truck Driver

Subclass No. 4

All women who prior to May 27, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who on and after March 24, 1972, were assigned to the youth aid division of the City police department. Listed below are named individuals who the parties to this Decree acknowledge are properly members of this subclass. Additional names

may be added to this subclass pursuant to the provisions of paragraph 36 of this Decree.

1. Betty Jensen
2. Annalee Saunders

Subclass No. 5

All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the police department as police officers, key punch operators, or clerk typists, or in the finance department as clerk typists or intermediate clerks, but who were not hired for those positions by the City of Birmingham during the period from March 24, 1972, through January 7, 1974.

APPENDIX D

The allocation of back pay amounts among the members of each subclass listed in Appendix C who file timely proof of claim forms shall be determined according to the following guidelines:

- a. **Subclass No. 1** - All subclass members will share equally in the back pay allocated to this subclass under the Decree. In addition, individual members of this subclass may be entitled to back pay under the Consent Decree with the Personnel Board. If members of this subclass also applied for a police officer, firefighter, or deputy sheriff position(s) with any other defendant jurisdiction(s) in these consolidated actions, such persons shall not be deemed to have waived any back pay or other rights which they may have against that jurisdiction(s). Back pay may be denied to members of this subclass who refused prior offers of employment with the City as police officers or firefighters.
- b. **Subclass No. 2** - Members of this subclass shall receive back pay according to the following formula:
 1. A calculation will be made of the difference between the annual pay of each subclass member in the unclassified service at the time of his reclassification and the annual pay he received in a classified service position at the time of reclassification. Some adjustments may be made in individual cases if there is evidence that an unclassified worker should have been reclassified in a higher paying job than the one he received at the time of reclassification.
 2. This difference will be multiplied by the number of years (rounded off to the nearest year) the back pay period for the jobs involved. The purpose of any such reduction(s) is to preclude the possibility of a "windfall" or double recovery for such claimant.

Public Works Supervisor and Construction Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, fulltime position as a Refuse Truck Driver, Heavy Equipment Operator, or Truck Driver in either the classified or unclassified service; and who demonstrate that, at any time between January 1, 1975 and October 31, 1979, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Public Works Supervisor or Construction Supervisor position.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, in a permanent, fulltime position as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and who after that date were employed in a permanent fulltime position with the City as a Refuse Truck Driver, Heavy Equipment Operator or Truck Driver in either the classified or unclassified service.

Category No. 4 This category consists of subclass members who were employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, and who accumulated at least ten (10) continuous years of service in the Streets and

Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category shall consist of the claims of any remaining subclass members for these jobs.

Construction Equipment Operator

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham, and who demonstrate that at any time between March 24, 1972, and October 31, 1979, they performed the work of a Construction Equipment Operator while classified as a Truck Driver, Semi-skilled Laborer or Unclassified Laborer in the Streets and Sanitation Department of the City.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974; who, on or after March 24, 1972, were employed in a permanent fulltime position as a Truck Driver or a Semi-skilled Laborer, and who demonstrate that at any time after March 24, 1972, they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Construction Equipment Operator position.

Category No. 3 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent fulltime position as a Truck Driver or Semi-skilled Laborer.

Category No. 4 This category consists of subclass members employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972, who accumulated at least ten (10) years continuous years of service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 5 This category consists of subclass members employed in the Streets and Sanitation Department of the City of Birmingham on or after March 24, 1972 who, after that date, were employed in a permanent fulltime position with the City as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 6 This category consists of the claims of any remaining subclass members for this job.

Labor Supervisor

Category No. 1 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who demonstrate that between March 24, 1972, and December 1, 1978, they expressed an interest to the City or the Personnel Board in being promoted to a Labor Supervisor position, and who, at the time they expressed such interest, were employed as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who have been employed in the Streets and Sanitation Department of the City of Birmingham on a continuous basis since at least January 1, 1974, and who,

between March 24, 1972 and December 1, 1978, were employed in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24, 1972, were employed in the Streets and Sanitation Department of the City of Birmingham, and who worked in a permanent full time position as a Truck Driver or Semi-skilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Heavy Equipment Operator

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, expressed an interest to the City or the Personnel Board in being promoted to a position as a Heavy Equipment Operator, and who, at the time they expressed such an interest, were employed as a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 2 This category consists of subclass members who at any time between March 24, 1972, and July 1, 1978, took the written promotional examination for Heavy Equipment Operator, and who, prior to January 1, 1979, were not promoted to a permanent, full time vacancy in that job.

Category No. 3 This category consists of subclass members who have been continuous-

ly employed in the Streets and Sanitation Department of the City of Birmingham since at least January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Semi-skilled Laborer in either the classified or unclassified service.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

Refuse Truck Driver

Category No. 1 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, can demonstrate that they expressed an interest to the City or the Personnel Board in being considered for a promotion to a Refuse Truck Driver position, and who at the time they expressed such an interest were employed as a Semi-skilled Laborer or as a Laborer in the unclassified service.

Category No. 2 This category consists of subclass members who have been continuously employed in the Streets and Sanitation Department of the City of Birmingham since January 1, 1974, and who, on or after March 24, 1972, were employed in a permanent full time position as a Semi-skilled Laborer or as a Laborer in the unclassified service.

Category No. 3 This category consists of subclass members who, on or after March 24, 1972, were employed by the City of Birmingham as a Semi-skilled Laborer or as a Laborer in the unclassified service, and who accumulated at least ten (10) years continuous

service in the Streets and Sanitation Department as a classified and/or unclassified employee.

Category No. 4 This category consists of the claims of any remaining subclass members for this job.

- d. **Subclass No. 4** - Back pay for members of this subclass shall be based upon the difference in earnings between traffic citation officers and/or police women and police sergeants. Members of this class who demonstrate that on or after March 24, 1972, they were assigned to the Youth Aid Division and performed the same or similar duties as male sergeants in that Division, shall receive a back pay award based upon the number of years worked in the Youth Aid Division on and after March 24, 1972.
- e. **Subclass No. 5** - Individual back pay for the members of subclass No. 5 shall be computed as follows. The number of actual vacancies filled by black persons in the positions and departments identified in Appendix C during the period from March 24, 1972, through January 7, 1974, will be subtracted from the number of vacancies in those positions that would have been expected to be filled by black persons if the proportion of black hires approximated the proportion of blacks who were certified for those vacancies during that period. This calculation will determine the black hire differential for each position. Back pay will be distributed to class members on a pro rata basis according to the relative black hire differential among the positions identified in the subclass definition.

Those individuals who turned down an offer for the position to which they were certified, failed to appear for an interview for such position after receiving notice of such interview, or whose pre-employment backgrounds clearly demonstrate that such persons were not minimally qualified for employment for such positions, shall be ineligible for back pay.

APPENDIX E

RELEASE

For and in consideration of the sum of [sum spelled out] Dollars (\$) and all other relief to be provided me by the City of Birmingham pursuant to the provisions of the *Consent Decree With the City of Birmingham* entered by the Honorable _____, United States District Judge, on [date] in the consolidated actions of *United States v. Jefferson County, et al.*, Civil Action Nos. 75-P-0666-S, 74-Z-17-S, 74-Z-12-S, I [full name of claimant], for myself and for my heirs, executors, administrators and assigns hereby release and discharge the City of Birmingham, its Mayor, officials, agents, and employees of and from all legal and equitable claims arising out of the subject matter of these consolidated actions or any other legal, equitable or administrative claims or causes of action arising out of alleged discrimination on the basis of either race or sex by the City of Birmingham, in violation of any Federal, state or local equal employment opportunity laws, statutes, regulations or ordinances occurring prior to the date of the execution of this Release. I further agree to discontinue any pending claim or action, whether legal, equitable or administrative, alleging race or gender discrimination by the City of Birmingham, its Mayor, and employees except with respect to any questions of attorneys fees and/or costs which may be pending in said actions.

I understand and agree that none of the parties hereby released, nor any other party, admits that I have any just claim against them or anyone else in respect to my said employment with the City of Birmingham, or application thereof, and that none of the parties hereby released, nor any other party, admits or has admitted liability to me or anyone else on account of any payment herein recited to have been made to me, or otherwise.

I carefully have read this Release as well as the accompanying Consent Decree entered [date]; I fully comprehend and understand that by signing this Release I am releasing my claim for back pay and that I am entitled to no other payment of monies for any claim of employment discrimination prior to the date this Release is executed from the City of Birmingham except as recited herein.

170a

I further certify and warrant that I have had the opportunity to consult an attorney prior to execution of this Release; that I am of lawful age; and, that I am signing this Release of my own free act and deed.

Signed this day of , 1981.

(Signature)

Social Security Number _____

Subscribed and sworn to before me
this undersigned authority on this
day of , 1981, to certify
which witness my hand and seal of office.

NOTARY PUBLIC

171a

APPENDIX F-1

NOTICE OF PROPOSED SETTLEMENT AGREEMENTS AND CONDITIONAL CLASS CERTIFICATION

There are currently before the United States District Court for the Northern District of Alabama proposed partial settlement agreements in the following consolidated employment discrimination actions: *Ensley Branch of the N.A.A.C.P., et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-12-S); *John W. Martin, et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-17-S); and *United States of America v. Jefferson County, et al.* (C.A. No. 75-P-0666-S).

The proposed settlement agreements are in the form of two Consent Decrees. One of the Consent Decrees is between each of the plaintiffs in the above actions and the defendants Jefferson County Personnel Board, its Director and the members of the Board (hereinafter Personnel Board or Board). The other Consent Decree is between these same plaintiffs and the City of Birmingham and its Mayor (hereinafter the City of Birmingham). The Consent Decrees will resolve all of the plaintiffs' claims of employment discrimination against blacks and women by these defendants. The Consent Decrees do not resolve the plaintiffs' claims of employment discrimination by the remaining defendant jurisdictions in these actions. These remaining defendants are: Jefferson County, Jefferson County Health Department, and the cities of Bessemer, Fairfield, Fultondale, Gardendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant and Vestavia Hills.

On _____, 1981 the District Court entered an Order granting provisional approval to both Decrees, subject to further hearings. In that Order the Court withheld final approval of the Consent Decrees until after any objections which may be filed to them, as further explained in Part II of this Notice.

I.

Class Certification Ruling

On _____, 1981 the District Court entered an Order pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in the *Ensley Branch* and *Martin* actions. In that Order the Court conditionally certified for purposes of these settlement agreements the following classes of black individuals who may be eligible to present a claim for back pay and other relief under the Consent Decrees.

1. All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977, and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by any of the defendant jurisdictions in these consolidated actions, or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by any of the defendant jurisdictions but may have been hired earlier but for their rank on such eligibility lists.

2. All blacks who prior to the submission of the Consent Decree with the City of Birmingham to the Court on May 19, 1981 were hired and assigned to laborer positions in the unclassified service of the City of Birmingham; who, at any time after March 24, 1972, worked as laborers in the unclassified service; and who, prior to the submission of this Decree to the Court, were reclassified into the classified service.

3. All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time between March 24, 1972 and May 19, 1981, the date of the submission of the Consent Decree with the City of Birmingham to the Court.

4. All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the Police Department as police officers, key punch operators, or clerk typists, or in the Finance Department as clerk typists or

intermediate clerks, but who were not hired for those positions during the period from March 24, 1972, through January 7, 1974.

There is also a class of women who are eligible to present a claim for relief under the Consent Decree with the City of Birmingham. This class consists of all women who, prior to May 24, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who, on and after March 24, 1972, were assigned to the Youth Aid Division of the City Police Department. The claims of this class are being presented solely as part of the action brought by the United States.

II.

Notice of Right To File Objections to the Consent Decrees and Fairness Hearing

This notice is directed to all persons who have an interest which may be affected by the Consent Decrees. Copies of the Decrees and the entire file in this proceeding are on file in the office of the Clerk of the Court for the Northern District of Alabama. They may be examined in the Clerk's office during normal working hours (Mon.-Fri. 8:00 a.m.-4:30 p.m.). The address of the Clerk's office is 1800 Fifth Avenue North, Birmingham, Alabama 35203. Any person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the court by ____ p.m., _____, 1981. Objections filed after that date will not be considered by the Court in determining whether to grant final approval to the Consent Decrees.

On _____, 1981, at ____ o'clock the District Court will hold a fairness hearing at which it will consider any timely filed objections to the Consent Decrees. Individual objectors may appear at that hearing with or without the assistance of legal counsel.

III.

**General Summary of the Consent Decree With The
Jefferson County Personnel Board**

These Consent Decrees contain a number of general injunctive provisions, including goals for blacks and women, each of which are designed to correct for the effects of any alleged past discrimination and to insure equal employment opportunities for all applicants and employees with the City and in the civil service system administered by the Personnel Board. The Consent Decrees also provide for back pay relief for certain classes listed above. Details of the general injunctive provisions and the back pay relief are set out in the Consent Decrees, an expanded notice sent to class members, and the court files, all of which are available in the office of the Clerk of the Court, or through the attorneys for the plaintiff classes, whose names and addresses are as follows:

Attorneys for the United States:

Richard J. Ritter
United States Department of Justice
Civil Rights Division
Federal Enforcement Section
Room 4517
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

*Attorneys for the Plaintiffs in Martin, et al.
v. the City of Birmingham:*

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

Attorney for the Plaintiffs in NAACP v. Seibels:

Oscar William Adams, III
1600 2121 Building
Birmingham, AL 35203
(205) 324-4445

**THE PERSONNEL BOARD OF
JEFFERSON COUNTY, ALABAMA
REQUEST FOR CERTIFICATION**

TO: Director of Personnel Status of Request
From 301-A Courthouse (For Personnel Board
Birmingham, Alabama Use Only)

FROM: B'ham Fire Dept.

DATE: 3/31/82

Classification Division	Examination Division
Requires Audit_____	Certification No. 509
Approx. Audit Date_____	Issue Date 4-2-52
Audit Completed_____	By JB
Result of Audit_____	Register Expired/Depleted_____
_____	Approx. Announcement Date_____
Board Approval_____	Date Register Available_____
_____	Consider Provisional_____

In accordance with Rule 4.5 of the Rules and Regulations, request is made for a certification from which to fill the following vacancy or vacancies:

1. TITLE OR NO. POSITIONS
POSITION Fire Lieutenant TO BE FILLED 5

TO FILL POSITION FORMERLY
HELD BY See Below NEW POSITION ()

2. TERM OF Permanent ()
EMPLOYMENT Temporary ()
 Relief Duty ()
Period of time: _____ Months _____ Days
Regular () Part time ()

Exhibit A

3. REMARKS Harold Mckee, Clarence Cooper, E.K.
Parker, William Averett, and Earl Starkey

AUTHORIZATION SIGNATURE Richard Arrington Jr.
REQUEST MADE BY Chief N. Gallant

PLEASE NOTE: Five (5) white males have been promoted to Fire Lt. since approval of the Consent Decree with the City of B'ham. Please certify sufficient blacks to meet our 50% interim annual hiring goal.

**PERSONNEL BOARD OF JEFFERSON COUNTY,
31 COURTHOUSE ANNEX, BIRMINGHAM, AL**

**CERTIFICATION OF ELIGIBLES
TO APPOINTING AUTHORITY**

**SIGN AND RETURN THE
YELLOW COPY TO
ROOM 309
COURTHOUSE ANNEX**

**CERTIFICATION
NUMBER
PROMOTIONAL
505**

In accordance with your request which is identified below, the names of the following persons who are eligible for appointment, are hereby certified to you.

After selecting the number of eligibles you are authorized to employ, enter your decision in the column headed "Action Taken" and date, sign and return the yellow copy of this form to the

<u>Mayor Richard Arrington, Jr.</u> City of Birmingham City Hall Birmingham, AL 35203	DIRECTOR OF PERSONNEL 301 Courthouse Annex BIRMINGHAM, ALA. 35203 Prompt reports will expedite the checking and certification of payrolls.
------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------

Date of Request	Requester	Class Title or Position	Date of Certification
3-31-82	Chief Gallant	Fire Lieutenant	April 2, 1982

This certification will become
void after two days from date

Number of Positions To be filled	Period of Employment	Beginning Rate of Pay
Five	Permanent	\$741.60 bi-weekly

Exhibit B

Name	Agency	Phone No.	Director of Personnel THIS SPACE TO BE FILLED OUT BY APPOINTING AUTHORITY	Date of Action Taken	Date of Appoint- ment
1. James A. Bennet	Birmingham Fire Dept.				
2. Floyd E. Click	Birmingham Fire Dept.				
3. James E. Laster	Birmingham Fire Dept.				
4. Ebb C. Hinton	Birmingham Fire Dept.				
5. Tony G. Jackson	Birmingham Fire Dept.				
6. Henry Ward, Jr.	Birmingham Fire Dept.				
7. Carl J. Harper	Birmingham Fire Dept.				

The rules require a medical and physical examination before appointment to a government position and thus no appointment shall become effective until the certificate of the medical examiner is received in this office.

Date Signature of
Appointing
Authority

APPENDIX F-2

**NOTICE OF PROPOSED SETTLEMENT
AGREEMENTS AND CONDITIONAL
CLASS CERTIFICATION**

There are currently before the United States District Court for the Northern District of Alabama proposed partial settlement agreements in the following consolidated employment discrimination actions: *Ensley Branch of the N.A.A.C.P., et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-12-S); *John W. Martin, et al. v. City of Birmingham, et al.* (C.A. No. 74-Z-17-S) and *United States of America v. Jefferson County, et al.* (C.A. No. 75-P-0666-S).

The proposed settlement agreements are in the form of two Consent Decrees. One of the Consent Decrees is between each of the plaintiffs in the above actions and the defendants Jefferson County Personnel Board, its Director and the members of the Board (hereinafter Personnel Board or Board). The other Consent Decree is between these same plaintiffs and the City of Birmingham and its Mayor (hereinafter the City of Birmingham). The Consent Decrees will resolve all of the plaintiffs' claims of employment discrimination against blacks and women by these defendants. The Consent Decrees do not resolve the plaintiffs' claims of employment discrimination by the remaining defendant jurisdictions in these actions. These remaining defendants are: Jefferson County, Jefferson County Health Department, and the cities of Bessemer, Fairfield, Fultondale, Gardendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant and Vestavia Hills.

On _____, 1981 the District Court entered an Order granting provisional approval to both Decrees, subject to further hearings. In that Order the Court withheld final approval of the Consent Decrees until after hearing any objections which may be filed to them, as further explained in Part II of this Notice.

I.

Class Certification Ruling

On _____, 1981 the District Court entered an Order pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure in the *Ensley Branch* and *Martin* actions. In that Order the Court conditionally certified for purposes of these settlement agreements the following classes of black individuals who may be eligible to present a claim for back pay and other relief under the Consent Decrees.

1. All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977, and the 20-B Firefighter test which resulted in the eligibility lists for firefighters in effect between July 8, 1976, and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by any of the defendant jurisdictions in these consolidated actions, or who subsequent to the entry of this Court's Order on January 10, 1977, were hired by any of the defendant jurisdictions but may have been hired earlier but for their rank on such eligibility lists.

2. All blacks who prior to the submission of the Consent Decree with the City of Birmingham to the Court on May 19, 1981 were hired and assigned to laborer positions in the unclassified service of the City of Birmingham; who, at any time after March 24, 1972, worked as laborers in the unclassified service; and who, prior to the submission of this Decree to the Court, were reclassified into the classified service.

3. All blacks who were denied promotional opportunities in the Streets and Sanitation Department of the City of Birmingham at any time between March 24, 1972 and May 19, 1981, the date of the submission of the Consent Decree with the City of Birmingham to the Court.

4. All black persons who were certified by the Personnel Board for positions with the City of Birmingham in the Police Department as police officers, key punch operators, or clerk typists, or in the Finance Department as clerk typists or inter-

mediate clerks, but who were not hired for those positions during the period from March 24, 1972, through January 7, 1974.

There is also a class of women who are eligible to present a claim for relief under the Consent Decree with the City of Birmingham. This class consists of all women who, prior to May 24, 1975, were hired by the City of Birmingham as traffic citation officers or policewomen and who, on and after March 24, 1972, were assigned to the Youth Aid Division of the City Police Department. The claims of this class are being presented solely as part of the action brought by the United States.

II.

Notice of Right to File Objections to the Consent Decrees and Fairness Hearing

This notice is directed to all persons who have an interest which may be affected by the Consent Decrees. Copies of the Decrees and the entire file in this proceeding are on file in the office of the Clerk of the Court for the Northern District of Alabama. They may be examined in the Clerk's office during normal working hours (Mon.-Fri. 8 a.m.-4:30 p.m.). The address of the Clerk's office is 1800 Fifth Avenue North, Birmingham, Alabama 35203. Any person who wishes to register an objection(s) to either of the Consent Decrees must file such objection(s) in writing with the Clerk of the Court by ___ p.m., _____, 1981. Objections filed after that date will not be considered by the Court in determining whether to grant final approval to the Consent Decrees.

On _____, 1981, at ___ o'clock the District Court will hold a fairness hearing at which it will consider any timely filed objections to the Consent Decrees. Individual objectors may appear at that hearing with or without the assistance of legal counsel.

III.

General Summary of the Consent Decree With The Jefferson County Personnel Board

This Consent Decree contains a number of general injunctive provisions each of which are designed to insure equal employment opportunities for all applicants and employees in the civil service system administered by the Personnel Board. The Personnel Board has agreed to review its testing and other selection procedures to insure that they do not unlawfully discriminate against either blacks or women.

To correct for the effects of any alleged past discrimination against blacks by the Personnel Board, the Consent Decree provides for interim annual certification goals in nineteen (19) classified service positions. These goals range from 33% to 50%. The jobs to which these certification goals apply are:

- | | |
|-----------------------------|-----------------------------|
| 1. Accountant | 11. Public Works Supervisor |
| 2. Account Clerk | (including Construction |
| 3. Animal Control Officer | Supervisor and Landfill |
| 4. Auditor | Supervisor) |
| 5. Automotive Mechanic | 12. Refuse Truck Driver |
| 6. Construction Equipment | 13. Revenue Examiner |
| Operator | 14. Secretary |
| 7. Engineering Aide | 15. Senior Clerk |
| 8. Heavy Equipment Operator | 16. Stenographer |
| 9. Intermediate Clerk | 17. Truck Driver |
| 10. Labor Supervisor | 18. Waste Water Treatment |
| | Plant Operator |
| | 19. Zookeeper |

The Consent Decree also incorporates a prior Order of the District Court entered on January 10, 1977 concerning the certification of blacks for police officer, deputy sheriff and firefighter positions. That Order requires, among other things, that the number of blacks certified for these jobs approximate the number of black applicants for those positions.

To correct for the effects of any alleged past discrimination against women by the Personnel Board, the Consent Decree provides for annual certification goals for women in fourteen (14) classified service jobs. The goals range from 10% to 25%. The jobs to which these certification goals apply are:

- | | |
|----------------------------------|---------------------------------|
| 1. Drafter | 8. Police Radio Dispatcher* |
| 2. Engineering Aide | 9. Radio Dispatcher* |
| 3. Engineering Drafter | 10. Revenue Examiner |
| 4. Engineering Technician | 11. Security Officer |
| 5. Firefighter | 12. Sr. Civil Engineer |
| 6. Graduate Engineer | 13. Stores Clerk |
| 7. Police Officer/Deputy Sheriff | 14. Traffic Planning Technician |

*Goals apply only to certifications to Fultondale, Gardendale, Midfield, Mountain Brook, and Tarrant.

All of the annual certification goals are subject to the availability of qualified black and female applicants, and they do not preclude the certification of qualified males and non-minorities. These goals are also temporary or interim measures because they are designed to end when certain minimum employment levels are reached. These levels are defined in terms of the percentage of blacks and women in the civilian labor force of Jefferson County.

The Consent Decree also provides for a lowering of the time in grade requirements prescribed by the Board for promotions in certain sworn police and fire department positions, such as police sergeant and fire lieutenant; the elimination of minimum height and weight requirements in all classified service jobs, including police officer and firefighter; and the elimination of promotional potential ratings in certain departments of the City of Birmingham and Jefferson County where such ratings had an adverse impact on blacks. Those departments are: City of Birmingham - Streets and Sanitation, Police, Fire, and Parks and Recreation; Jefferson County - Cooper Green Hospital, General Services.

Promotional eligibility requirements in certain public works and streets and sanitation positions have been revised to

expand the pool of employees eligible for promotional consideration. For example, if this Consent Decree is finally approved by the Court, employees in unclassified laborer and semi-skilled laborer positions would be eligible to take promotional examinations for jobs such as refuse truck driver and heavy equipment operator. In the past, employees in these jobs were not eligible to take these promotional examinations.

The Consent Decree provides for \$35,000.00 in back pay for a class of blacks who took the Personnel Board's written tests for police officer positions which resulted in eligibility lists in effect between April 25, 1975, and January 10, 1977, or who took the tests for firefighter positions which resulted in eligibility lists in effect between July 8, 1976 and January 10, 1977. Back pay for individual class members will be contingent on the filing of timely proof of claim forms with the Clerk of the Court.

The Decree also provides for the priority certification of nineteen (19) named black individuals to various jobs in the Streets and Sanitation Department of the City of Birmingham. These jobs include public works supervisor, labor supervisor, construction equipment operator and refuse truck driver.

IV.

General Summary of the Consent Decree With The City of Birmingham

The Consent Decree contains injunctive provisions which are designed to insure equal employment opportunities with the City for all persons without regard to race or sex in hiring, promotion, training, job assignments, discharge, and other terms and conditions of employment.

To correct for the effects of any alleged past discrimination against blacks and women, the Decree contains interim annual hiring and promotion goals for blacks and women. The goals are subject to the availability of qualified black and female applicants, and they do not preclude the hiring or promotion of qualified males and non-minorities. The goals are temporary or interim measures because they are designed to end

when the percentage of blacks and women in the affected jobs or groups of jobs approximate the percentage of blacks and women in the labor force of Jefferson County.

The City has agreed to interim annual hiring and promotion goals for blacks in the following specific job categories:

- | | |
|------------------------------------|---------------------------------|
| 1. Account Clerk | 11. Police Sergeant |
| 2. Automotive Mechanic | 12. Fire Lieutenant |
| 3. Building Inspector | 13. Public Works Supervisor |
| 4. Construction Equipment Operator | 14. Construction Supervisor |
| 5. Firefighter | 15. Refuse Truck Driver |
| 6. Gardener | 16. Revenue Examiner |
| 7. Heavy Equipment Operator | 17. Secretary |
| 8. Labor Supervisor | 18. Senior Clerk |
| 9. Police Officer | 19. Senior Sanitation Inspector |
| 10. Police Radio Dispatcher | 20. Zookeeper |

The Consent Decree also provides for annual employment goals for blacks in certain groups of jobs in the following departments: Engineering, Finance, Inspection Services, Traffic Engineering, and Housing.

The Consent Decree provides for annual hiring and promotional goals for women in police officer and police sergeant positions, and in groups of jobs in the following departments: Fire, Engineering, Inspection Services, Municipal Garage, Housing, Streets and Sanitation, Traffic Engineering, Parks and Recreation and Parking Authority.

The City has agreed to lower the time in grade requirement for promotions in several sworn positions in the Police and Fire Departments such as police sergeant and fire lieutenant, and it has agreed to expand the pool of employees eligible to apply for promotions to jobs in the Streets and Sanitation Department. The City has also agreed to discontinue the use of promotional potential ratings in the Police, Fire, Streets and Sanitation, and Park and Recreation Departments.

The Consent Decree provides for \$30,000.00 in back pay for six (6) of the named plaintiffs in the *Martin* action, and for \$235,000.00 in back pay for four subclasses of blacks and a

subclass of women. These subclasses consist of: (1) blacks who took the police officer tests for the City of Birmingham which resulted in eligibility lists in effect between April 25, 1975, and January 10, 1977, and the firefighter tests for the City of Birmingham which resulted in eligibility lists in effect between July 8, 1976, and January 10, 1977; (2) blacks in unclassified laborer positions with the City who between March 24, 1972 and May 19, 1981 were reclassified into the classified service; (3) blacks who between March 24, 1972 and May 19, 1981, were denied promotional opportunities in the Streets and Sanitation department of the City; (4) women employed as traffic citation officers or policewomen who, between March 24, 1972, and May 27, 1975, were assigned to the Youth Aid Division of the City Police department; and (5) blacks who were certified but not hired for certain positions in the Police and Finance departments of the City between March 24, 1972, and January 7, 1974.

The back pay amounts set aside for each of the subclasses identified above are: Class 1 (\$5,000.00), Class 2 (\$65,000.00), Class 3 (\$137,000.00), Class 4 (\$6,000.00), Class 5 (\$22,000.00).

Procedures for allocating the amounts of back pay among members of each of the subclasses are set out in Appendix D to the Consent Decree with the City of Birmingham. Each subclass member will be required, after final approval of the Consent Decree, to file a proof of claim form in order to be eligible for an award of back pay.

The Consent Decree provides for priority hiring and/or promotions and remedial seniority for several of the named plaintiffs in the *Martin* case, and for nineteen (19) named members of subclass 3 in the Streets and Sanitation department of the City of Birmingham. Certain other members of each of the five subclasses may be eligible for priority hiring or promotional opportunities and remedial seniority based upon the individual facts of their claims. Their relief is to be determined after they submit the appropriate proof of claim forms.

V.

Attorneys' Fees and Costs

Neither of the Consent Decrees contains an award of attorney fees or costs for counsel for the plaintiffs. The amount of attorneys' fees and costs as finally determined will NOT REDUCE the amounts to be distributed as back pay to any of the subclass members or named plaintiffs under either of the Consent Decrees.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department of Justice
Civil Rights Division
Federal Enforcement Section
Room 4517
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

*Attorneys for the Plaintiffs in Martin, et al.
v. the City of Birmingham:*

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

Attorney for the Plaintiffs in NAACP v. Seibels:

Oscar William Adams, III
1600 2121 Building
Birmingham, AL 35203
(205) 324-4445

APPENDIX G

Notice to [Subclass definition]:

This announcement is to inform you of your right to present a claim for individual relief under a Consent Decree between the plaintiffs and the City of Birmingham in the consolidated actions of: *Ensley Branch of the N.A.A.C.P. et al. v. City of Birmingham, et al.*, C.A. No. 74-Z-12-S; *John W. Martin, et al. v. City of Birmingham*, C.A. No. 74-Z-17-S; and *United States of America v. Jefferson County, et al.*, C.A. No. 75-P-0666-S.

If you are member of the subclass described in the caption of this notice you may fill out the attached proof of claim form and mail it to the Clerk of the Court for Northern District of Alabama. Enclosed for your use is an unstamped envelope containing the mailing address of the Clerk of the Court.

If you wish to present a claim for individual relief under the Consent Decree, your proof of claim form must be received by the Clerk of the Court by no later than ____ p.m. on _____, 1981. If you do not file this proof of claim form with the Clerk of the Court by that date then, absent good cause shown, you will be deemed to have waived your right to present a claim for individual relief under the Consent Decree.

After your proof of claim form is filed, you will be contacted by attorneys for the plaintiffs. They will review with you your proof of claim form and the relevant facts which support your claim. Thereafter, these attorneys will make a recommendation to the Court whether your claim merits an award of individual relief under the Consent Decree. Such an award may include a job offer or promotion with the City, remedial seniority and/or back pay. The City has reserved the right to review and to object to any individual job offers and/or remedial seniority dates proposed by counsel for the plaintiffs on your behalf which have not been previously agreed upon by the parties under the Consent Decree. The City has agreed not to contest any of the individual back pay determinations. If any objections are raised by the City to any proposed job offers and/or remedial seniority for you, and if the parties are unable

to resolve such objections, then the Court will determine the appropriate relief, if any, for you under this Consent Decree.

After final determinations have been made of the individual awards of relief to be made under this Consent Decree, you will be notified of your individual award, if any. If you do not receive an award of individual relief under the Consent Decree, or if you are not satisfied with the amount of relief provided to you, you will have the right to file an objection to the resolution of your claim with the Clerk of the Court. That objection will be subsequently ruled upon by the District Court. The procedures for filing any such objections will be explained to you in the notice you will receive informing you of your award of relief, if any.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department of Justice
Civil Rights Division
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

*Attorneys for the Plaintiffs in Martin, et al.
v. the City of Birmingham:*

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

*Attorneys for the Plaintiffs in Martin, et al.
v. the City of Birmingham:*

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

APPENDIX H

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within either or both of the classes described below. If you check either of the boxes, please complete this proof of claim form by supplying the information requested below.

____ I am a black person who took a written test administered by the Personnel Board of Jefferson County for a job as a police officer with the City of Birmingham. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

____ I am a black person who took a written test administered by the Personnel Board of Jefferson County for a job as a firefighter with the City of Birmingham. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you check either of the boxes above, please indicate in the space provided below whether you were ever contacted by the City of Birmingham for employment as a police officer or firefighter, and the approximate date(s) of such contact to the best of your recollection. Also, please indicate whether you were ever offered employment with the City as a police officer or firefighter, and the date you began employment with the City if you accepted such a job offer.

194a

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

195a

APPENDIX I

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box provided below if the statement next to the box applies to you and you wish to present a claim for relief under the Consent Decree with the City of Birmingham.

☐ I am a black person who worked for the City of Birmingham as an unclassified laborer on or after March 24, 1972 and who was later brought into the classified service on _____ (fill in approximate date) as a _____ (fill in job title). I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

APPENDIX J**Proof of Claim Form**

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box provided below if the statement next to the box applies to you. If you check the box, please complete the proof of claim form by supplying the information requested below.

☐ I am a black person who was employed by the City of Birmingham in the Streets and Sanitation Department on or after March 24, 1972 in either a classified or unclassified position, and I was denied the opportunity to apply for a promotion to a higher paying position in the Streets and Sanitation Department after that date. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

I.

Please supply the following additional information:

Please list the job(s) which you claim you were denied promotional opportunities in:

[Please note: You may list a job(s) in the space provided above even if you were not eligible to apply for it under the promotion policies of the City of Birmingham or the Personnel Board of Jefferson County.]

2. How long have you been employed in the Streets and Sanitation Department of the City of Birmingham? (Include classified and unclassified service time) _____

3. List the approximate date when you were first hired by the City. (If you were first hired as an unclassified laborer please list that date) _____

4. Please list all of the jobs in which you have worked on a permanent full time basis in the Streets and Sanitation Department of the City and the approximate dates you worked in those jobs.

5a. Have you ever taken a written promotional examination for the job of Heavy Equipment Operator in the Streets and Sanitation Department of the City? Yes__ No__

b. If your answer to a is yes please indicate the date(s) you took the examination. _____

c. Please indicate whether at any time prior to January 1, 1979 you ever received a promotion to a permanent full time position as a Heavy Equipment Operator in the Streets and Sanitation Department of the City. Yes__ No__

6. Have you ever expressed an interest to any official of the City of Birmingham or the Personnel Board of Jefferson County about being promoted to any of the jobs you have listed in your answer to 1 above? If so, please supply the following information in the space provided below: (1) the approximate date(s) that you expressed such an interest, (2) the person to whom such interest was expressed, (3) the job you were in at the time you expressed your interest, and (4) indicate whether

198a

you were ever offered such a promotion by the City or the Personnel Board.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

199a

APPENDIX K
Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the box immediately below if the statement next to the box applies to you. If you check the box, please complete the proof of claim form by supplying the information requested below.

____ I am a female who prior to May 27, 1975, was hired by the City of Birmingham as a traffic citation officer or policewoman and who, on or after March 24, 1972 was assigned to the Youth Aid Division of the City Police Department. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you were originally hired as a traffic citation officer and were subsequently promoted or reclassified to a position as a policewoman, please indicate whether you were credited with your seniority as a traffic citation officer at the time you became a policewoman.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

APPENDIX L

Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within any of the classes described below. If you check any of the boxes, please complete the proof of claim form by supplying the information requested below.

____ I am a black person who applied for a job as a police officer with the City of Birmingham between March 24, 1972 and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

— I am a black person who applied for a job as a keypunch operator with the City of Birmingham between March 24, 1972, and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

____ I am a black person who applied for a job as a clerk typist with the City of Birmingham between March 24, 1972, and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

____ I am a black person who applied for a position as an intermediate clerk with the City of Birmingham between March 24, 1972, and January 7, 1974, and I was not hired or offered employment by the City in that job. I wish to present a claim for relief under the Consent Decree with the City of Birmingham.

If you have checked any of the boxes above, please indicate in the space provided below whether to the best of your recollection you were ever contacted by the City of Birmingham

for an interview for the job or jobs you have checked, whether you appeared for that interview, and, if so, what happened during that interview. If you need more space to supply this information you may attach additional sheets of paper to this proof of claim form.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature _____

Date: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

v.

JEFFERSON COUNTY, *et al.*,
Defendants.

CIVIL ACTION
NO. 75-P-0666-S

JOHN W. MARTIN, *et al.*,
Plaintiffs,

v.

CITY OF BIRMINGHAM, *et al.*,
Defendants.

CIVIL ACTION
NO. 74-Z-17-S

ENSLEY BRANCH OF THE
NAACP, *et al.*,
Plaintiffs,

v.

GEORGE SEIBELS, *et al.*,
Defendants.

CIVIL ACTION
NO. 74-Z-12-S

**CONSENT DECREE WITH THE JEFFERSON COUNTY
PERSONNEL BOARD**

These consolidated actions were brought by the United States and certain private plaintiffs against the Jefferson County Personnel Board, and other defendants not included within the terms of this Decree, to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e,

et seq., the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221, *et seq.*, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3766(c)(1), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States. In their Complaints, the plaintiffs allege, *inter alia*, that the Jefferson County Personnel Board (hereinafter the "Personnel Board" or "Board"), in carrying out its employee selection functions for Jefferson County and other jurisdictions within Jefferson County, has engaged in a pattern or practice of discrimination based on race and sex.

The Personnel Board denies it has engaged in any pattern or practice of discrimination or other types of discrimination on the basis of race or sex in carrying out its employee selection functions. However, the Board realizes that certain facts concerning past practices of the Personnel Board might have given rise to an inference that such a pattern or practice existed, and that this Court entered a Decision and Order in these consolidated actions on January 10, 1977, concerning Personnel Board testing practices for entry level police, deputy sheriff and fire positions, 14 FEP Cases 670, *aff'd in part, reversed in part and remanded*, 616 F.2d 812 (5th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 15, 1980). For the purposes of avoiding further litigation, and in resolution of the dispute over the claims of discrimination against the Personnel Board, the United States, the plaintiffs who are signatories to this Decree, and the Personnel Board are now willing to agree to the entry of this Consent Decree. The plaintiffs and the defendant Jefferson County Personnel Board wish to avoid the delay and expense of further litigation and to insure that any alleged disadvantages to blacks and women that may have resulted from any alleged past discrimination against them in their obtaining employment and advancement are remedied so that equal employment opportunities will be provided to all. The plaintiffs who are signatories to this Decree and the Personnel Board, by agreeing to the issuance of this Decree, waive any findings of fact and conclusions of law on all outstanding issues pertaining solely to the Personnel Board's liability in these consolidated actions, except for costs and attorneys [sic] fees. The Personnel Board agrees to negotiate with the plaintiffs in the

Martin case regarding the amount of attorneys fees and costs to plaintiffs in the *Martin* case and will negotiate with plaintiffs regarding the amount of such fees. If the parties are unable to reach agreement on the amount of such fees and costs, the Court will resolve the dispute. The United States waives its right to recover costs against the Personnel Board.

By entering into this Decree the plaintiffs do but waive their rights to have this Court determine the liability and remedial obligations, *vel non*, of any other defendant based upon such defendant's use of Personnel Board recruitment and selection practices or any other employment practices which have been or remain the subject of litigation in these actions. This Decree shall not however constitute an adjudication or admission by the Personnel Board of any violation of law or findings on the merits of these cases.

Now therefore, on the basis of the foregoing representation of the United States, and counsel for the other plaintiffs who are signatories to this Decree and the Personnel Board, and all trial proceedings and discovery filed herein to date, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. GENERAL PROVISIONS

1. The defendant Jefferson County Personnel Board and its officers, agents, employees, successors and all persons acting in concert with them or any of them in the performance of their official functions are subject to the terms of this Consent Decree, and shall refrain from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, those jurisdictions served by the Personnel Board because of such individual's race or sex. The defendant Jefferson County Personnel Board and its officers, agents, employees, successors and all persons acting in concert with them or any of them in the performance of their official functions, shall not discriminate against any employee or applicant for employment in certifying for hire or promotion, in upgrading, training, assignment or discharge, or with respect to com-

pensation, terms and conditions or privileges of employment, because of such individual's race or sex.

2. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h), (j), and the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by intervention or collateral attack. If any collateral lawsuit involving this Consent Decree arises in state court, then the Personnel Board shall notify counsel for the plaintiffs and remove such action to the United States District Court.

II. TESTING AND OTHER SELECTION PROCEDURES

A. In General

3. All phases of the Personnel Board's testing and other selection and certification procedures for both hires and promotions shall continue to be reviewed periodically by the Board to assure that such procedures comply with the standards and requirements of the *Uniform Guidelines on Employee Selection Procedures*, 43 F.R. 38250 (August 25, 1978) (hereinafter "*Uniform Guidelines*"). More specifically, the Personnel Board shall utilize qualifications, tests or other selection standards or procedures which the Board can demonstrate either have no adverse impact or have been validated in accordance with the *Uniform Guidelines*. In this regard, the Personnel Board shall continue to apply statistical tests to, and otherwise conduct analysis of, the various data generated in the course of using or assessing the validity of any such qualifications, tests or other selection standards or procedures for the purpose of making a good faith effort to determine whether there are any alternative measures, including revisions in scoring and ranking procedures, which may be followed which will reduce or eliminate any adverse impact on blacks or women, and which would continue to provide a sufficient pool of qualified candidates for certification and selection in accordance with the goals of this Decree.

B. Written Tests In Specific Jobs

4. The Personnel Board may continue to administer its current written tests for the jobs of Account Clerk, Accountant, Auditor, Intermediate Clerk, Revenue Examiner, Secretary, Senior Clerk, Stenographer, Police Sergeant and Sheriff's Sergeant for the certification of candidates for those jobs, provided that such certifications are in conformity with the interim certification goals for any such jobs for which a certification goal is established by paragraph 24 of this Decree.

5. The Personnel Board shall no longer administer any of the written tests which were challenged by the plaintiffs in these actions to establish eligibility lists for any of the following jobs:

- | | |
|---------------------------|-----------------------------------------|
| 1. Animal Control Officer | 5. Heavy Equipment Operator |
| 2. Zoo Keeper | 6. Waste Water Treatment Plant Operator |
| 3. Automotive Mechanic | |
| 4. Engineering Aide | 7. Construction Equipment Operator |

The Personnel Board may continue to use any eligibility lists based in whole or in part upon the scores applicants received on any of the challenged written tests for the jobs identified above if such lists remain in effect on the date this Decree is approved and entered by the Court. However, any certifications from such eligibility lists shall be in conformity with the interim certification goals set forth in paragraph 24 below.

6. Any qualifications, tests or other selection standards or procedures used for the establishment of new eligibility lists and/or certifications in the jobs listed in paragraph 5 shall be designed so as to eliminate or reduce any adverse impact in certifications against blacks, and shall be consistent with the standards and requirements of the Uniform Guidelines as specified in paragraph 3. Certifications from such new eligibility lists shall be consistent with the goals for the certification of blacks as set forth in paragraph 24 below.

7. The Personnel Board may continue to administer the 20-B firefighter test and the 10-C police officer test provided that certifications are in compliance with this Court's Order of

January 10, 1977, which is incorporated herein as part of this Consent Decree. The plaintiffs reserve the right to petition the Court for supplemental relief under that Order as incorporated herein in the event that the percentage of black applicants for police officer/deputy sheriff positions falls below 35% and the percentage of black applicants for firefighter positions falls below 25%.

C. High School Education Requirements

8. The Personnel Board shall no longer require that applicants for the jobs listed below possess a high school diploma (or G.E.D. equivalent) in order to be eligible to be considered for employment in those positions, unless the Personnel Board can demonstrate in accordance with the provisions of paragraph 3 of this Decree that such selection criteria comply with the requirements of the *Uniform Guidelines*.

1. Zoo Keeper
2. Engineering Aide
3. Firefighter
4. Power Distribution Helper
5. Police Radio Dispatcher/ Radio Dispatcher
6. Waste Water Treatment Plant Operator

D. Promotional Potential Ratings

9. The Personnel Board may continue the use of its current promotional potential rating system in departments where it is shown to have no adverse impact. The Board shall discontinue the use of its current promotional potential rating system in the following departments of the following jurisdictions where such ratings have been demonstrated to have had an adverse impact on blacks.

Jurisdiction	Department
City of Birmingham	Streets & Sanitation
City of Birmingham	Police
City of Birmingham	Fire
City of Birmingham	Parks & Recreation
Jefferson County	Cooper Green Hospital
Jefferson County	General Services

10. The Personnel Board further agrees to discontinue the use of its current promotional potential rating system to determine eligibility for promotion in any other department where based upon any two successive rating cycles (one cycle consisting of 6 months) there is evidence of adverse impact against blacks. In determining adverse impact under this subpart the parties agree to rely upon section 4D of the *Uniform Guidelines*.

11. If the Personnel Board seeks to institute any new promotional potential rating system, it shall first be instituted on an experimental basis in a department or departments selected by the Personnel Board. As soon as data becomes available, the Personnel Board shall serve upon counsel for the plaintiffs a report reflecting the impact of the system on blacks. This report shall be submitted in conformity with the reporting requirements of paragraph 50 below.

If such report disclosed that this new rating system has an adverse impact on blacks, then the Personnel Board shall, as soon as practicable, serve upon counsel for the plaintiffs a copy of any studies and support data bearing upon the validity of this system under the *Uniform Guidelines*. Compliance with the requirements of this paragraph shall not relieve the Personnel Board or a defendant jurisdiction from any liability under Title VII and this Decree which may result from the interim or permanent use of a new rating system which has an adverse impact on blacks.

12. Should any of the plaintiffs have objection to any such promotional potential rating system, they may file such objection with the Court within 60 days of their receipt of the documents identified in paragraph 11 above, or within 60 days of their receipt of copies of the ratings for the first two rating cycles. If such an objection is filed, the Personnel Board shall not utilize or shall cease utilizing any such promotional potential rating system unless and until approved by the Court.

E. Time In Grade Requirements For Promotions In Police, Sheriff and Fire Department Positions

13(a). The Personnel Board shall not require police officers and deputy sheriffs to serve more than three years

uninterrupted service in rank (or two years uninterrupted service in the rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant or sheriff's sergeant, nor shall it require police sergeants and deputy sheriff sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant or sheriff's lieutenant [sic]. Employees who have obtained permanent status as police lieutenant or sheriff's lieutenant shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. The Personnel Board agrees that it shall not announce a new promotional examination for police sergeant or sheriff's sergeant for the City of Birmingham or Jefferson County for a period of at least one year following the entry of this Decree.

13(b). The Personnel Board shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank.

13(c). For purposes of subparagraphs (a) and (b) the term "uninterrupted service" shall include any time spent as a probationary employee.

F. Height-Weight Requirements

14. The Personnel Board previously discontinued the use of minimum height and weight requirements as selection criteria for any classified service position. The Personnel Board may continue to administer its class A, class B and class C physical standards for classified service positions provided that no minimum height or minimum weight requirements are followed.

G. Eligibility To Apply For Promotions To Certain Jobs

15. The Personnel Board may prescribe that in combination with or in lieu of taking a promotional examination for the positions of Public Works Supervisor, Sanitation Inspector

or Construction Supervisor that applicants for such positions be required successfully to complete a job related training program of no more than 12 weeks duration for that job. This program may be extended for individuals who fail successfully to complete such training within the prescribed time. Such program is to be under the direct supervision of the Personnel Board as to design, content, and related logistics. If any tests are used and administered as part of such program they shall be designed and administered in accordance with the provisions of paragraph 3 above. The Personnel Board may utilize the resources of any of the separate jurisdictions so affected in the preparation and conduct of such training program. The Personnel Board may also institute training programs for classified or unclassified employees in other positions identified in paragraphs 16 through 20 below, provided such training programs are established and implemented in accordance with the provisions of this paragraph. Eligibility for any training programs established by the Board under this paragraph shall be open to all employees in the lower rated classifications as specified by paragraphs 16 through 20 below. Candidates for such training who are employed in the classified or unclassified service shall not be required to incur any reduction in their hourly or salaried wage rates or any loss of seniority in order to receive such training. Any training programs established by the Personnel Board under this paragraph shall not be used or maintained so as to interfere with the Board's ability to meet the certification goals set forth in paragraph 24.

16. In order to apply to take a promotional examination in the jurisdiction where employed for the position of Public Works Supervisor or Construction Supervisor, each applicant must have permanent status in one of the following classifications: Truck Driver, Refuse Truck Driver, Labor Supervisor, Heavy Equipment Operator, or Construction Equipment Operator. To apply to take the promotional examination for the position of Sanitation Inspector, an employee must have permanent status as a Truck Driver or Semi-skilled laborer.

17. If the Personnel Board establishes a classification of Refuse Collection Supervisor, then promotional eligibility shall be limited to employees with permanent status as Truck Driver and Refuse Truck Driver. Certifications to such classifications

shall be in accordance with the goal for Public Works Supervisor as set forth in paragraph 24. The pay grade and steps within grade for that classification shall be set and maintained at no less than the pay grade and steps within grade for the classification of Public Works Supervisor. The Personnel Board may, if justified by future pay plan audits, raise the Refuse Collection Supervisor classification to a pay grade higher than that of Public Works Supervisor. If a Refuse Collection Supervisor position is established in the City of Birmingham, the number of Refuse Collection Supervisors shall be at least two fifths (2/5ths) of the total number of Public Works Supervisor positions in the City of Birmingham.

18. The Personnel Board shall permit any employee who has worked full-time in an unclassified laborer position for twelve consecutive months to apply to take a promotional examination in the jurisdiction where employed for the following classifications: Semi-skilled Laborer, Truck Driver, Refuse Truck Driver, Equipment Service Worker, Automotive Mechanic Helper. As used in this paragraph, the term laborer shall include the classifications of Building Service Worker, Laborer and Refuse Collector.

19. The Personnel Board shall permit any employee who has obtained permanent status as a Semi-skilled Laborer or Truck Driver to apply to take a promotional examination in the jurisdiction where employed for the following classifications: Truck Driver, Refuse Truck Driver, Labor Supervisor, Heavy Equipment Operator, Equipment Service Worker, Automatic Mechanic Helper.

20a. The Personnel Board shall permit any employee who has obtained permanent status as a Heavy Equipment Operator, Refuse Truck Driver, or Labor Supervisor to apply to take a promotional examination in the jurisdiction where employed for the classification of Construction Equipment Operator. In addition, employees of the City of Birmingham who have obtained permanent status as truck drivers shall also be permitted to apply to take the promotional examination for Construction Equipment Operator in Birmingham.

20b. The Personnel Board agrees that it shall not certify any candidates for permanent, full time positions with the City of Birmingham until after this Court grants final approval to this Consent Decree in any of the following positions: Public Works Supervisor, Construction Supervisor, Construction Equipment Operator, Labor Supervisor, Heavy Equipment Operator, or Refuse Truck Driver.

21. Attached as Appendix A to this Decree is a list of incumbent employees of the Streets and Sanitation Department of the City of Birmingham. Immediately upon final approval of this Consent Decree by the Court, those individuals shall be certified for promotion to the first vacancy in the Streets and Sanitation Department in a permanent, full time position in the job listed next to their names. Such individuals shall not be required to take any further promotional examinations or training in order to be certified for promotion under this paragraph. As future vacancies arise in such jobs, the Board shall continue to certify these individuals for promotion until each such individual is promoted to such job, or declines an offer of promotion to such job. If any individual identified in Appendix A declines an offer of promotion by the City of Birmingham to the job listed next to his name, the Personnel Board shall be under no further obligation to consider that individual as eligible for priority certification for promotion under the terms of this paragraph. However, this shall not preclude or in any way adversely affect the right of any such person to apply for future promotional opportunities in a classified service position under the Personnel Board's normal promotion procedures as modified by this Consent Decree.

III. SEX RESTRICTIONS IN JOB ANNOUNCEMENTS AND CERTIFICATIONS

22. The Personnel Board shall not restrict any job announcements or certifications on the basis of sex except that the Board may continue to certify males to supervise male juvenile offenders at the Jefferson County Detention Home. The Personnel Board may establish a special medical examination to be given to applicants for nurses aide and laundry worker positions. Such examination shall be used solely to determine

whether applicants for such positions are physically qualified to perform the duties of those jobs, and it shall not be used to discriminate in purpose or effect against female applicants.

IV. GOALS FOR BLACKS AND WOMEN

23. The parties to this Consent Decree recognize that the decision to employ persons certified by the Personnel Board is left to the sole discretion of the appointing authority of each jurisdiction. For this reason, the Personnel Board agrees that it will continue to certify blacks and women in accordance with the goals of this Consent Decree to each of the jurisdictions currently served by the Personnel Board until such time as the employment of blacks in the jobs identified in paragraph 24 and of women in the jobs identified in paragraph 25 in each jurisdiction approximates the respective percentages in the civilian labor force of Jefferson County as reflected by the 1970 Federal Census. The parties agree to recognize any changes in those percentages which may come about as a result of the final publication of the 1980 Census.

24. Subject to the availability of qualified black applicants, the Personnel Board shall establish and attempt to meet an annual goal of certifying to each of the jurisdictions currently served by the Board black applicants at the rates set forth below or at the rate of black representation among applicants who meet job related requirements to apply for such jobs, whichever is higher. The parties preserve the right to adjust, by agreement, any of those goals where it can be shown that a professional degree, license or certificate is required to perform the duties of any of the jobs referred to in this paragraph, and that these annual certification goals do not reasonably reflect the percentage of qualified blacks in the relevant labor market who possess such degrees, licenses or certificates.

Job Classification	Certification Goal
1. Accountant	33 %
2. Account Clerk	33 %
3. Animal Control Officer	33 %
4. Auditor	33 %
5. Automotive Mechanic	33 %

6.	Construction Equipment Operator	50%
7.	Engineering Aide	33%
8.	Heavy Equipment Operator	50%
9.	Intermediate Clerk	33%
10.	Labor Supervisor	50%
11.	Public Works Supervisor (including Construction Supervisor and Landfill Supervisor)	50%
12.	Refuse Truck Driver	50%
13.	Revenue Examiner	50%
14.	Secretary	33%
15.	Senior Clerk	33%
16.	Stenographer	33%
17.	Truck Driver	50%
18.	Waste Water Treatment Plant Operator	33%
19.	Zoo Keeper	33%

With regard to certifications to the jobs of Police Sergeant and Sheriff's Sergeant, the Personnel Board agrees to certify sufficient numbers of qualified blacks to meet any promotion goals for this job established by a Consent Decree or litigated Decree between the United States and/or any other plaintiff and any other defendant in these consolidated actions in accordance with the provisions of paragraph 34 below.

25. Subject to the availability of qualified female applicants, the Personnel Board shall establish and attempt to meet an annual goal of certifying to each of the jurisdictions currently served by the Board qualified female applicants at the rates set forth below or at the rate of female representation among applicants who meet the job related requirements to apply for such jobs, whichever is higher. The parties preserve the right to adjust, by agreement, any of those goals where it can be shown that a professional degree, license, or certificate is required to perform the duties of any of the jobs referred to in this paragraph.

Job Classification	Certification Goal
Drafter	15%
Engineering Aide	15%
Engineering Drafter	15%
Engineering Technician	15%
Firefighter	10%
Graduate Engineer	10%
Police Officer/Deputy Sheriff	25%
Police Radio Dispatcher*	20%
Radio Dispatcher*	20%
Revenue Examiner	20%
Security Officer	25%
Sr. Civil Engineer	10%
Stores Clerk	20%
Traffic Planning Technician	10%

* Certification goal only applies to those jurisdictions where this job has been previously restricted to males only. Those jurisdictions are: Fultondale, Gardendale, Midfield, Mountain Brook and Tarrant.

26. In filling any vacancies covered by paragraphs 24 and 25 above, the appointment of a black female shall count toward both black and female interim certification goals.

27. The parties recognize that the certification goal set by this Decree for female firefighters may not accurately reflect the availability of female applicants for this job assuming full compliance with the affirmative recruitment obligations set forth in paragraph 29 below. Accordingly, two years after the date of entry of this Decree the parties shall review the efforts of the Personnel Board to recruit female firefighters (as well as any such recruitment efforts conducted by any of the jurisdictions served by the Board), together with female applicant flow data for that job in order to determine whether the female certification goal should be raised or lowered to more accurately reflect the availability of females for this job.

28. The parties further agree to consider the establishment of an interim certification goal for females in the jobs listed below two years following the date of entry of this Decree. At that time, if recruitment efforts and/or applicant flow data support it, the parties shall negotiate appropriate interim certification goals for women in any or all of such jobs.

1. Building Inspector
2. Carpenter
3. Electrical Inspector
4. Electrician
5. Gas Inspector
6. Mains Service Worker
7. Maintenance Repair Worker
8. Painter
9. Power Distribution Helper
10. Plumber
11. Plumbing Inspector
12. Refrigeration & Heating Mechanic
13. Semi-Skilled Laborer
14. Voting Machine Mechanic
15. Waste Water Treatment Plant Operator
16. Waste Water Treatment Plant Worker

V. RECRUITMENT

29. The Personnel Board shall continue to operate a comprehensive recruitment program designed to meet the needs of the service and specific requirements set out in this Consent Decree. To meet these purposes, the Personnel Board, in addition to its own resources, shall have access to and utilize what other resources may be deemed appropriate and available from each and every jurisdiction and department thereof comprising the merit system subject to the Civil Service Act and terms of this Decree.

30. The Personnel Board will continue to engage in affirmative recruitment activities which are consistent with its obligation to take all reasonable steps to reach the goals set forth in this Decree, and will insure that the Personnel Board's policy of affirmative recruitment and non-discrimination in hiring is emphasized to blacks and women. Wherever feasible, the Board shall utilize newspaper, radio and other media of mass circulation in an effort to attract qualified applicants. The Board shall maintain regular contact with area high schools, technical and vocational schools, the Alabama Department of Employment Security and minority and women's organizations such as the Urban League and the NAACP. The Board shall

continue to notify such schools and organizations of anticipated job vacancies in the classified service and shall send to them examination announcements sufficiently in advance of any scheduled examination to provide such schools and organizations a reasonable opportunity to refer qualified minority and female applicants. Such announcements shall continue to specify that the Personnel Board is an equal opportunity employer.

31. The Personnel Board shall continue to insure that promotional examination announcements and announcements of training opportunities are issued and posted in conspicuous places within each jurisdiction and department reasonably in advance of any scheduled promotional examination or training opportunities in order to provide incumbents with a fair opportunity to apply for promotion or training and to adequately prepare for the promotional examination or training. In this regard, the Personnel Board shall insure that all persons eligible for training programs and promotional examinations have equal access to all books, articles, pamphlets, and other materials which are used for preparation for such examinations or training, and that these materials are made available to such persons reasonably in advance of any scheduled promotional examinations or training.

VI. THE UNCLASSIFIED SERVICE

32. Effective September 1, 1981, the Personnel Board shall recommend to the appropriate jurisdictions that all unclassified laborer positions with the exception of seasonal or temporary manual labor positions be brought into the classified service with all attendant rights, benefits, wages, and privileges presently accorded to classified employees. The Personnel Board will recommend that each employee who enters the classified service pursuant to the provisions of this paragraph shall be credited in his or her classified service position with all seniority previously accrued in the unclassified service as determined by the records of the governing body. Further, such seniority will be credited for all purposes including, but not limited to, layoff, pension, vacation and sick leave. Such credited seniority shall not require under this Decree any pay-

ments by a jurisdiction to a pension fund in excess of any amounts previously paid into such fund on behalf of the affected employee. Breaks in service shall not be computed in establishing an employee's seniority rights under this paragraph unless such break in service was occasioned by documented illness or other documented physical disability.

33. All current classified employees who previously entered the classified service from an unclassified laborer position either through promotion or reallocation shall likewise be credited immediately upon the entry of this decree with all seniority previously accrued in the unclassified service. Such seniority shall be computed and credited in the same manner as provided for in paragraph 32.

VII. ADOPTION OF AFFIRMATIVE ACTION PLANS

34. If a jurisdiction which is a defendant in these actions adopts, and the Court approves, a Consent Decree with the United States and/or any other plaintiff in these actions, or if the Court enters a litigated Decree in resolution of the claims of employment discrimination of the United States and/or any other plaintiff in these actions, which Decree establishes hiring and/or promotion goals for blacks or women for positions in the classified service, the Personnel Board shall seek to insure that it recruits and certifies sufficient numbers of qualified blacks and women to afford any such jurisdiction a reasonable opportunity to meet the goals of its Consent Decree. As a means of insuring that sufficient numbers of blacks and women are certified to meet the goal of this Consent Decree or a Consent Decree or litigated Decree with a defendant jurisdiction, the Personnel Board may certify at least three eligibles for any job vacancy in the classified service and, where necessary to meet such goals, may expand further the number of eligibles certified for a particular job vacancy.

The Personnel Board shall be afforded a reasonable opportunity to review a Consent Decree of another defendant prior to its approval by this Court. If the Board determines that even if it complies fully with the recruitment and testing provisions of this Decree, it will not be able to certify sufficient numbers of qualified blacks or women to afford another defendant a

reasonable opportunity to meet a particular goal established by its Consent Decree, the Board may move the Court to relieve it of any liability under this paragraph concerning that particular goal. The Board may not seek relief from liability under this paragraph concerning any goal(s) set by this Consent Decree or a Consent Decree of a defendant jurisdiction for any of the jobs identified in paragraphs 7, 24 and 25 of this Decree.

35. If a defendant jurisdiction fails or refuses to enter into a Consent Decree with the United States and/or any other plaintiff in this action, the Personnel Board retains the right to consider and approve or disapprove any affirmative action plans which may be submitted to the Personnel Board by any defendant jurisdiction pursuant to Rule 4.5(h) of the Board's Rules and Regulations. The parties recognize that any such affirmative action plans, if approved by the Personnel Board, shall not constitute a waiver by the plaintiffs of any of their claims of employment discrimination or appropriate relief against any such defendant jurisdiction in these consolidated actions.

VIII. INDIVIDUAL RELIEF

A. Back Pay

36a. The Personnel Board agrees to pay the sum of \$35,000 in full and complete settlement of the plaintiffs' claims against the Personnel Board for monetary relief. The Board shall deposit this sum in a trust account bearing interest at commercial rates within thirty (30) days after this Court gives provisional approval to this Consent Decree. In the event the Court refuses to give final approval to the Decree, this sum shall be returned to the Personnel Board with any interest accrued on such sum. This sum shall be used to compensate the class of blacks identified in Appendix B of this Decree. Back pay relief for the blacks identified in Appendix A of this Decree will be afforded under the Consent Decree with the City of Birmingham. The members of the subclass identified in Appendix B do not wave [sic] any rights they may have for monetary or other relief against any other defendants in these consolidated actions other than the Personnel Board.

36b. Each member of the class identified in Appendix B who files a timely response to the notice of right to participate in the back pay settlement and this Decree (Appendix F), shall receive a pro rata share of the \$35,000, provided that no such individual payments shall be made to any such person until that individual has filed with the Clerk of the Court a signed and notarized release in the form set forth in Appendix C.

B. Relief For Named Private Plaintiffs

37. The plaintiffs and the Personnel Board acknowledge that Ida McGruder, John Martin, Wanda Thomas, and Eugene Thomas (all named plaintiffs in *Martin, et al. v. City of Birmingham*, et al.) (Civil Action No. 72-17-S) were previously certified as qualified for certain positions with the City of Birmingham and/or Jefferson County. In the event that the City of Birmingham and/or Jefferson County agrees to offer employment opportunities to any of the above named individuals, the Personnel Board authorizes their hiring without need for further certification.

C. Notification of Right To Present A Claim for Individual Relief

38. Within ten (10) days after the Court grants final approval to this Consent Decree, written notices will be given by the Personnel Board by certified mail to each of the class members identified in Appendix B. Notice to such individuals shall be sent to their last known address. The form of the notice is attached as Appendix D. Proof of claim forms (attached as Appendix E) will be included with the individual notices to class members.

39. Each class member shall be required to file his or her proof of claim form with the Clerk of the Court within a date no more than sixty (60) days from the date of mailing. Within forty-five (45) days after receipt of all timely proof of claim forms, counsel for the plaintiffs will submit to the Court and counsel for Personnel Board a report listing each class member who, in their view, is entitled to participate in the back pay provisions of this Consent Decree. In no event will the sum of the individual monetary awards to be made under this Decree exceed the sum of \$35,000, plus any interest accrued thereon.

40. Within twenty (20) days after the submission of the plaintiffs' report, the Personnel Board shall notify by certified mail each of the class members who filed a timely request to be considered for individual relief of the proposed awards of relief to such person, if any. This notice shall also inform each of these individuals of their right to object to the relief, if any, as contained in the report, and that they must file their objection in writing with the Clerk of the Court within fifteen (15) days of their receipt of this notice.

41. The Court shall thereafter, and as soon as practicable, schedule a hearing at which it will rule upon any objections to the report which have been timely filed. At the conclusion of such hearing the Court shall determine whether to give final approval (or approval with modifications) to the awards of individual relief.

D. Implementation of Individual Relief

42. Any person entitled to individual relief under this Decree, in order to obtain such relief, must sign a notarized release which will be provided that person by the Personnel Board in accordance with paragraph 43, *infra*, and return such notarized release to the Board within thirty (30) days of that person's receipt thereof. Any such individual who either does not sign such a notarized release or, alternatively, and absent good cause, does not return such signed notarized release to the Board within thirty (30) days of that person's receipt thereof, shall be deemed to have waived his or her entitlement to such relief. Such release shall provide that the relief to which that person is entitled under this Decree, if accepted, shall be in full and final settlement of any and all claims against the Board based upon allegations of racial discrimination occurring prior to the date such release is signed. Such release shall be in the form exemplified by Appendix C attached hereto.

43. The Personnel Board shall send a notice to each of the persons entitled to individual relief informing them that the Court has given final approval to their right to such relief under this Decree. This notification shall be in writing, be made by certified mail, return receipt requested, and shall be approved as to substance and form by the plaintiffs prior to mailing. In-

cluded with such notice will be a copy of this Decree and the release form as described in paragraph 42 above. Such notification also shall state that if the recipient has any questions about the notice, he or she may contact counsel for the Personnel Board or counsel for the plaintiffs whose names, addresses and phone numbers shall be listed in the notice, or their own counsel.

44. As the Personnel Board receives releases from the class members entitled to a back pay award under this Decree, it shall immediately issue a check drawn from the back pay fund established by this Decree to such person in the amount of his or her back pay award.

IX. NOTICE OF PROVISIONAL APPROVAL OF THE CONSENT DECREE AND FAIRNESS HEARING

45a. Within ten (10) days after provisional approval of this Consent Decree by the Court, notice will be issued by publication in the Sunday edition of the Birmingham News for two consecutive weeks, and in the Birmingham Times on one week-day directed to all interested persons informing them of the general provisions of this Decree and of their right to review a copy of the Decree which will be on file with the Clerk of the Court. Within the same ten (10) day period, individual notice will also be given of the general provisions of this Decree by the Personnel Board to the subclasses identified in Appendix C. The cost of mailing and publication of any notices to be made under this Decree shall be paid by the Personnel Board. Both the notices by publication and the individual notices shall inform persons to which such notices are directed of their right to be heard and to file objections, if any, to this Decree. Such objections must be filed with the Clerk of the Court by a date to be set by the Court in its Order granting provisional approval to this Decree. The Court shall thereafter, and on a date(s) to be fixed by the Court in its Order granting provisional approval to the Decree, schedule a fairness hearing at which those persons who file timely objections to the Decree will be heard. At the close of such hearing, or as soon as practicable thereafter, the Court shall rule upon such objections and grant final ap-

proval or disapproval to this Consent Decree. The Court shall, however, withhold final approval of the awards of individual relief to be made under this Decree (except the relief to be granted the individual named plaintiffs in the *Martin* case and the certifications for promotions to be made to the individuals named in Appendix A) until those individuals who file a timely response to the notice of right to present a claim for relief under paragraph 39 above are notified of their individual awards, if any, and are afforded an opportunity to be heard and to file any objections they may have to those awards.

X. RECORDS AND REPORTS

47. Within 60 days of the entry of this Consent Decree and thereafter semi-annually the Personnel Board shall provide counsel for the plaintiffs with the following information:

a. A summary report (or computer tape) showing the total number of permanent, non-probationary employees by race and sex in both the classified and unclassified service in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

b. A summary report (or computer tape) showing the total number of probationary employees by race and sex in the classified service in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

c. A summary report (or computer tape) showing the total number of employees by race and sex employed under the Comprehensive Employment and Training Act (CETA) in each job classification of each department for each of the jurisdictions currently served by the Personnel Board.

d. A summary report (or computer tape) showing by race, sex and job title the total number of persons certified to and appointed by each department of each of the jurisdictions currently served by the Personnel Board during the reporting period. The Personnel Board shall also retain for a period of two years for inspection at the written request of counsel for any of the plaintiffs to the

Board's legal counsel, copies of the individual certification sheets with the individuals certified and appointed identified by race and sex from which the above summary reports or computer tapes are prepared.

e. A summary report (or computer tape) showing the applicant flow by race and sex for each job classification in the classified service. For purposes of this subparagraph the term applicant shall include any person who files a written application with the Personnel Board. Such summary reports or computer tapes shall separately identify by race and sex the number of persons who file written applications with the Personnel Board. In addition, the Personnel Board shall also retain on file for a period of at least 24 months copies of all post cards filled out by persons who appear at the Personnel Board's main office on which they indicate a desire to be notified of future examinations for classified service positions. The Board shall record the race and sex of the person filling out the card at the time it is received.

f. A summary report of the Personnel Board's recruitment activities during the reporting period which were specifically designed to attract qualified black and women applicants. Included in such report shall be a list of all minority and/or women's organizations or associations and any professional schools, colleges, universities or trade schools where recruitment efforts were made specifically directed towards blacks and/or women, the dates such recruitment efforts were made, and the jobs for which blacks and/or women were being recruited.

48. Within 60 days of the entry of this Consent Decree and thereafter semi-annually, the Personnel Board shall provide counsel for the plaintiffs with the following information for each of the jobs listed in paragraphs 4 and 5 of this Consent Decree and for the jobs of police officer/deputy sheriff, police/sheriff's lieutenant, police/sheriff's captain, firefighter, fire lieutenant, fire captain, labor supervisor and public works supervisor.

(a) The total numbers of persons by race and sex who during the relevant reporting period applied to be tested and/or evaluated for employment.

(b) The total numbers of persons by race and sex who passed and who failed any such tests and/or evaluations for employment.

(c) The identification by name, race and sex of each person selected for appointment during the reporting period by each of the jurisdictions currently served by the Personnel Board.

(d) For any test or selection procedure which was administered during the relevant reporting period provided for above in any of the jobs identified by this paragraph, the Personnel Board shall submit a report detailing the manner in which such tests or selection procedures were scored or graded including the impact of such scoring or grading on black applicants, an analysis of the reliability and standard error of measurement of the test scores, the mean scores or grades of all applicants, white applicants, and blacks [sic] applicants, and the standard deviations of the scores or grades of all applicants, white applicants, and black applicants on each such test or selection procedure. If any such test scores or grades on a selection procedure are used for ranking purposes, such report shall include the raw data of the impact on black applicants of the use of such test scores for ranking purposes together with an explanation of the ranking procedures. Attached to such report shall be copies of the eligibility lists identified by race and sex which were compiled as a result of the administration of any of the tests or selection procedures during the relevant reporting period covered by the report.

49. Within 60 days of the entry of this Consent Decree the Personnel Board shall provide counsel for the plaintiffs with the following information with respect to the Board's promotional potential rating system:

(a) the number of persons by race, department, job classification and jurisdiction who received a promotional potential rating during the rating period immediately preceding the entry of this Decree;

(b) the number of persons by race, department, job classification and jurisdiction who scored above and who

scored below the minimum score established for promotional eligibility during that rating period.

As new rating cycles are completed, the Personnel Board shall, within 60 days of the completion of such cycle, submit to counsel for the plaintiffs impact data in the form required by subparagraphs (a) and (b) above.

50. If the Personnel Board institutes a new promotional potential rating system in accordance with the provisions of paragraph 11, the reports required to be submitted to counsel for the plaintiffs under that paragraph shall include the following information:

(a) the number of persons by race, department, and job classification who received a promotional potential rating during the experimental rating period;

(b) the number of persons by race, department and job classification who scored above and who scored below the minimum score established for promotional eligibility;

(c) the name, race, department, job classification and promotional potential score of each person who received a promotional potential rating during the experimental rating period. Also included next to their names shall be an identification of the race of the rater or raters who issued that person's promotional potential rating.

51. If the Personnel Board establishes any training programs in accordance with the provisions of paragraph 15 of this Decree, the Board shall provide counsel for the plaintiffs with the following information for each training class:

(a) The total number of persons by race, sex, department and jurisdiction who applied for such training;

(b) The total number of persons by race, sex, department and jurisdiction who were selected for training;

(c) The total number of persons, if any, by race, sex, department and jurisdiction who were disqualified from or failed to complete the training program;

(d) The total number of persons by race, sex, department and jurisdiction who successfully completed such training.

52. The Personnel Board shall retain on file and available for inspection at the written request of any of the plaintiffs' legal counsel to the Board's legal counsel copies of all tests, training and experience evaluations, promotional potential ratings, and any other selection instruments together with any document, forms, reports, statistical compilations and other records which relate to the construction, scoring, use, and validity of such selection procedures.

53. The Personnel Board shall retain for a period of two years on file and available for inspection at the request of any of the plaintiffs' legal counsel copies of all formal written applications for each job in the classified service. If any applicant is determined by the Personnel Board not to be qualified for employment in the job or jobs for which the applicant has applied, the reasons for such disqualification shall be recorded and kept on file with the applicant's application.

XI. EFFECT OF COMPLIANCE

54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the Personnel Board with all obligations arising under Title VII of the civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

XII. RETENTION OF JURISDICTION

55. The Court retains jurisdiction of this action for such further relief or other orders as may be appropriate. At any time after six (6) years subsequent to the date of the entry of the Consent Decree, any party to this Decree may move the Court upon forty-five (45) days notice to the other, to dissolve this Consent Decree. In considering whether the Consent Decree shall be dissolved, the Court will take into account whether the primary purposes of this Consent Decree have been substantially achieved.

Entered and ordered this day of , 1981.

UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO: DATED:

For Plaintiff United States:

/s/ Richard J. Ritter May 19, 1981

For the Plaintiffs in *Martin, et al.*
v. *City of Birmingham, et al.*:

/s/ Susan W. Reeves/ Stephen L. Spitz May 19, 1981

For the Plaintiffs in *Ensley Branch*
of the *N.A.A.C.P., et al. v. Seibels, et al.*:

/s/ Oscar W. Adams, III May 19, 1981

For the Personnel Board:

/s/ David P. Whiteside, Jr. May 19, 1981

APPENDIX A

Name	Job
1. Charles Jordan	Construction Equipment Operator*
2. Trennon Nickerson	Construction Equipment Operator*
3. Roosevelt Parker	Construction Equipment Operator*
4. Mose Shine, Jr.	Construction Equipment Operator*
5. Charles Boyd	Labor Supervisor
6. Herman Copes	Labor Supervisor
7. Avance Lomax	Labor Supervisor
8. Samuel Bandy	Public Works Supervisor**
9. A. B. Campbell	Public Works Supervisor**
10. Willie Cargill	Public Works Supervisor**
11. Major Florence	Public Works Supervisor**
12. Willie Gossum	Public Works Supervisor**
13. Clyde Hill	Public Works Supervisor**
14. Arthur Jones	Public Works Supervisor**
15. Cleo Lewis	Public Works Supervisor**
16. Alfred Menifield	Public Works Supervisor**
17. Orman Skinner	Public Works Supervisor**
18. James Parker, Jr.	Refuse Truck Driver
19. Charlie Simmons	Refuse Truck Driver

* Certification for promotion shall be to a future vacancy at the landfill unless the individual expresses to the Personnel Board in writing a desire to be certified for a Construction Equipment Operator position in another location of the Street and Sanitation Department.

** Certification for promotion shall be to a future vacancy in a Public Works Supervisor (or Refuse Collection Supervisor) position in sanitation unless the individual expresses to the Personnel Board in writing a desire to be certified for a Public Works Supervisor position in another area of the Streets and Sanitation Department. If any such individual indicates in writing that he would be interested in a Public Works Supervisor position in either sanitation or street construction and street maintenance, he shall be certified to the first permanent vacancy which arises in either position in accordance with the provisions of paragraph 21 of this Decree.

APPENDIX B

All black persons who took the 10-C Policeman Test which resulted in the eligibility lists for police officers and deputy sheriffs which were in effect between April 25, 1975 and January 10, 1977 and the 20-B Firefighter Test which resulted in the eligibility lists for firefighters in effect between July 8, 1976 and January 10, 1977, who have not been hired for police officer, deputy sheriff or firefighter positions by a defendant jurisdiction in any of these consolidated actions or who subsequent to the entry of this Court's Order of January 10, 1977, were hired by a defendant jurisdiction but who may have hired earlier but for their rank of such eligibility lists.

APPENDIX C

RELEASE

For and in consideration of the sum of [sum spelled out] Dollars (\$____) and all other relief to be provided me by the Jefferson County Personnel Board pursuant to the provisions of the *Consent Decree in Resolution of Issues Involving the Jefferson County Personnel Board entered by the Honorable _____*, United States District Judge, on [____ date ____] in the consolidated actions of *United States v. Jefferson County, et al.*, Civil Action Nos. 75-P-0666-S, 74-Z-17-S, 74-Z-12-S, I [full name of claimant], hereby release and discharge the Jefferson County Personnel Board of and from all legal and equitable claims arising out of this action or any other legal, equitable or administrative claims or causes of action arising out of alleged racial discrimination by the Personnel Board, in violation of any Federal, state or local equal employment opportunity laws, statutes, regulations or ordinances occurring [sic] prior to the date of the execution of this Release. I further agree to discontinue any pending claim or action, whether legal, equitable or administrative, alleging race discrimination by the Jefferson County Personnel Board except with respect to any questions of attorneys fees and/or costs which may be pending in said action.

I carefully have read this Release as well as the accompanying Consent Decree entered [____ date ____]; I fully comprehend and understand the contents thereof; and I execute this Release of my own free act and deed.

Signed this ____ day of _____, 1981.

[Signature]

Social Security Number _____

Subscribed and sworn to before me
this undersigned authority on this
____ day of _____, 1981, to certify
which witness my hand and seal of office.

NOTARY PUBLIC

APPENDIX D

Notice to [Subclass definition]:

This announcement is to inform you of your right to present a claim for back pay relief under a Consent Decree between the plaintiffs and the Jefferson County Personnel Board in the consolidated actions of: *Ensley Branch of the N.A.A.C.P. et al. v. City of Birmingham, et al.*, C.A. No. 74-Z-12-S; *John W. Martin, et al. v. City of Birmingham*, C.A. No. 74-Z-17-S; and *United States of America v. Jefferson County, et al.*, C.A. No. 75-P-0666-S.

If you are a member of the subclass described in the caption of this notice you may fill out the attached proof of claim form and mail it to the Clerk of the Court for Northern District of Alabama. Enclosed for your use is an unstamped envelope containing the mailing address of the Clerk of the Court.

If you wish to present a claim for back pay relief under this Consent Decree, your proof of claim form must be received by the Clerk of the Court by no later than ____ o'clock on _____, 1981. If you do not file this proof of claim form with the Clerk of the Court by that date then, absent good cause shown, you will be deemed to have waived your right to present a claim for back pay relief under this Consent Decree.

After your proof of claim form is filed, you will be contacted by attorneys for the plaintiffs. They will review with you your proof of claim form and the relevant facts which support your claim. Thereafter these attorneys will make a determination of whether your claim merits an award of back pay relief under this Consent Decree.

After final determinations have been made of the back pay awards to be made under this Consent Decree, you will be notified of your individual award, if any. If you do not receive an award of individual relief under the Consent Decree, or if you are not satisfied with the amount of relief provided to you, you will have the right to file an objection to the resolution of your claim with the Clerk of the Court. That objection will be subsequently ruled upon by the District Court. The procedures for filing any such objections will be explained to you in the

notice you will receive informing you of your award of relief, if any.

If you have any questions with respect to this notice, the Consent Decree, or the procedures for filing your proof of claim form, you may call or write any of the attorneys listed below:

Attorneys for the United States:

Richard J. Ritter
United States Department of Justice
Civil Rights Division
Washington, DC 20530
(202) 633-4086

Caryl Privett
Assistant United States Attorney
Northern District of Alabama
200 Federal Courthouse
Birmingham, Alabama 35203
(205) 254-1785

*Attorneys for the Plaintiffs in Martin, et al.
v. the City of Birmingham:*

Stephen L. Spitz
Lawyers Committee for
Civil Rights Under Law
Suite 520
733 Fifteenth Street, N.W.
Washington, DC 20005
(202) 628-6700

Susan Reeves
Reeves & Still
2027 First Avenue North
Suite 400
Birmingham, AL 35203
(205) 322-7479

APPENDIX E
Proof of Claim Form

Please list your:

Name: _____

Current Address: _____

Current Telephone Number: _____

Please check the appropriate box or boxes if you fall within either or both of the classes described below. If you check either of the boxes then please complete this proof of claim for by supplying the additional information requested below.

☐ I am a black person who took the written test administered by the Personnel Board of Jefferson County for the job of police officer. I wish to present a claim for relief under the Consent Decree with the Personnel Board of Jefferson County.

☐ I am a black person who took the written test administered by the Personnel Board of Jefferson County for the job of firefighter. I wish to present a claim for relief under the Consent Decree with the Personnel Board of Jefferson County.

If you check either of the boxes above, please indicate in the space provided below whether you were contacted for an interview for that job by any of the police or fire departments of any of the following jurisdictions: Birmingham, Jefferson County, Bessemer, Fairfield, Fultondale, Gardendale, Homewood, Hueytown, Midfield, Mountain Brook, Pleasant Grove, Tarrant, Vestavia Hills. If so, please indicate the jurisdiction(s) which contacted you.

If you were contacted for an interview by any of the above jurisdictions please indicate in the space provided below whether you appeared for that interview, the approximate date(s) of such interview, and whether you were offered employment as a police officer or firefighter with that jurisdiction.

Finally, please indicate in the space provided below which of the jurisdictions listed above you would have considered accepting an offer of employment with if such an offer would have been made to you. You may list as many jurisdictions as you were interested in.

Please sign and date this proof of claim form and return it to the Clerk of the Court in the enclosed self-addressed envelope.

Signature

Date: _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEFFERSON COUNTY, *et al.*,

Defendants,

CIVIL ACTION
NO. 75-P-0666-S

JOHN W. MARTIN, *et al.*,

Plaintiffs,

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants,

CIVIL ACTION
NO. 74-Z-17-S

ENSLEY BRANCH OF THE
NAACP, *et al.*,

Plaintiffs,

v.

GEORGE SEIBELS, *et al.*,

Defendants.

CIVIL ACTION
NO. 74-Z-12-S

OPINION

This litigation involves various charges of racial and sexual discrimination in governmental employment in Jefferson County, Alabama. Charged with engaging in a pattern and practice of discrimination are the Jefferson County Personnel Board and some fourteen separate county and municipal

employers which participate in the multi-unit civil service system administered by the Personnel Board.

In January 1977, the court found that tests used by the Personnel Board to screen and rank applicants for employment as police officers and firefighters discriminated against blacks and were not shown to be job related under criterion-related validity studies. Those rulings, sub nom. *Ensley Branch of the N.A.A.C.P. v. Seibels*, 13 EPD ¶ 11,504, 14 FEP Cases 670, were upheld by the Fifth Circuit. See 616 F.2d 812, 22 FEP Cases 1207 (1980). The basic features of the civil service system are described in those opinions and will not be repeated here.

A second trial was held in August and October, 1979. At issue under F. R. Civ. P. Rule 42(b) were a number of other claims directed against practices of the Personnel Board. Under attack by the plaintiffs were eighteen other tests; various rules affecting promotional opportunities; the imposition of height, weight or educational requirements for certain jobs; and the restriction of some job announcements and certifications to persons of a particular sex. The Personnel Board defended by asserting that the challenged practices either had no adverse impact upon blacks or women or were nevertheless permissible under the employment discrimination laws.

During the period that the court was preparing its decision following the second trial, it was advised that the parties had commenced serious negotiations in an effort to resolve by settlement not only those issues already submitted to the court but also additional issues relating to the practices of some of the governmental employers, which had been severed under Rule 42(b) for yet an additional trial. The court was kept generally advised over the course of the following months—for the negotiations proved far more time-consuming than the parties had originally anticipated—of the general progress of the discussions, although not the details of any proposed settlement. Completion of the court's decision, many pages of which had already been drafted, was deferred in view of the prospect of settlement.

In June 1981 the parties tendered to the court two proposed consent decrees which would, if approved, settle the

plaintiffs' claims against both the Personnel Board and the City of Birmingham.¹ Tentative settlement classes for purposes of these decrees were formed, and notice of the proposed settlement and of the rights to be heard in opposition was given both by publication and by individual mailing to certain individuals. Objections to the proposed decrees were timely filed on behalf of three groups. A fourth objection by an individual, although untimely, was by consent also considered by the court at a fairness hearing under F. R. Civ. P. Rule 23 held on August 3, 1981.

For decision at this time is the question whether the proposed settlements should be approved. At the outset it should be noted that there is no contention or suggestion that the settlements are fraudulent or collusive. Rather, the issue is whether—considering the terms of the proposed decrees, the nature of the objections, the status of judicial proceedings, and the evidence before the court—the settlements should under the current state of the law be held to be unreasonable, unfair, inadequate, inequitable, illegal, unconstitutional, or against public policy. See *United States v. City of Alexandria*, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

Although the decrees, which with attachments exceed 100 typewritten pages, would affect many employment practices and jobs, the objections are focused upon provisions relating to the certification, hiring, and promotion of persons in the police and fire departments of the City of Birmingham. Billy Gray, a white male lieutenant in the fire department, joined by the Birmingham Firefighters Association, objects to various segments of the decrees designed to increase the number of

¹ Claims against other governmental employers serviced by the Personnel Board are not resolved by the proposed decrees but remain subject to further proceedings and trial.

blacks and women in that department. Johnny Morris and six other individuals, who presumably are white police officers,² object to provisions intended to increase the employment and promotion of minorities in the police department, while the Guardian Association—a group largely comprised of black officers—asserts that the decrees provide an inadequate remedy for past discrimination against blacks. James Miller, a white male, complains that his opportunities for employment as a police officer are unfairly curtailed by the present and proposed rules regarding that position. No other objections were made to the proposed decrees.

Gray, Morris, and those who joined in their objections assert that the settlements may accord preferential treatment to blacks and women with respect to future vacancies in the city's police and fire departments—a contention that can hardly be disputed. What is controverted is their argument that such favoritism would constitute an impermissible "reverse discrimination" in the absence of a finding or admission of prior discrimination by the city against those groups, particularly insofar as it might operate to benefit individuals who personally never were the victims of any discrimination by the city or to disadvantage those who personally never were the beneficiaries of such discrimination. Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 17 FEP Cases 1000 (1978). Also in controversy is the position of Gray and the Firefighters that certain of the rules to be altered should be deemed as equivalent to the terms of a collectively bargained seniority system, which could not be modified without their consent. See *Myers v. Gilman Paper Corp.*, 554 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977); but cf. *United States v. City of Miami*, 614 F.2d 1322, 22 FEP Cases 846 (5th Cir. 1980), pet. for reh'g en banc granted and

² Although written objections were timely filed on their behalf, Morris and the other six persons named in the document did not appear in person or by counsel to be heard in opposition to the settlement. The brief of the City of Birmingham suggests that these objectors are city police officers, and the nature of the objections filed under their name supports that inference.

opinion vacated, 625 F.2d 1310, 23 FEP Cases 1510 (5th Cir. 1980).

The objectors are certainly correct in their underlying premise—that not all forms of “affirmative action” to aid minorities can be defended against an assertion of “reverse discrimination” and that the principal focus for remedial measures upon proof of discrimination is to provide appropriate relief for those who were the harmed by those acts or practices. The Supreme Court has, however, upheld as against an attack under Title VII of the Civil Rights Act of 1964 the voluntary adoption by a non-governmental employer of hiring goals and preferential treatment for minorities, even though these procedures would benefit persons never discriminated against by the employer and even though indeed there had been no showing of any discrimination by that employer. *United Steelworkers of America v. Weber*, 443 U.S. 193, 20 FEP Cases 1 (1979), rev’g 563 F.2d 216, 16 FEP Cases 1 (5th Cir. 1977). The Courts of Appeals have moreover upheld the use of goals and quotas for governmental and non-governmental employers, both in the context of judicial remedies after proof of discrimination and in the form of settlement of unproven claims of discrimination, not only when attacked under Title VII but also when challenged under the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. See *United States v. City of Alexandria*, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980); *Detroit Police Officers Ass’n v. Young*, 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), cert. denied, 452 U.S. 938, 25 FEP Cases 1683 (June 15, 1981); *Valentine v. Smith*, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (8th Cir., July 21, 1981); *Setser v. Novack Investment Co.*, 657 F.2d 962, 50 LW 2066, 26 FEP Cases 513 (8th Cir., July 21, 1981) (en banc); *Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 22 FEP Cases 1786 (2nd

Cir. 1980); cf. *Talbert v. City of Richmond*, 648 F.2d 925, 25 FEP Cases 953 (4th Cir. 1981). Also see pre-Bakke cases cited in the *City of Miami* opinion, 614 F.2d at 1335-36.

The goals and quotas here under attack are well within the limits upheld as permissible in these decisions. First, they do not preclude the hiring or promotion of whites and males even for a temporary period of time.³ Rather, the relevant parts of the proposed decrees provide, in summary, as follows: (1) the Personnel Board will certify black applicants for entry-level positions as police officers and firefighters as earlier directed by this court after trial (and as affirmed by the Fifth Circuit), i.e., basically at a rate commensurate with the relative percentage of black applicants; (2) the Board will attempt to certify women for these entry-level positions at a rate commensurate with the relative percentage of women applicants or, if higher, at the rate of 1 woman to 3 men for police officer and of 1 woman to 9 men for firefighter; (3) the Board will attempt to certify black and female candidates for higher-level positions in the departments in a manner as will permit the city to attain its own goals and, where necessary for this purpose, can certify more than the top three candidates found eligible by it; (4) subject to the availability of qualified candidates, the city agrees to hire into these entry-level positions blacks and women at a rate commensurate with the percentage of black and female applicants or, if higher, at the rate of 1 black to 1 white, at the rate of 1 woman to 3 men for police officer, and at the approximate rate of 1 woman to 6 men for firefighter; (5) subject to the availability of qualified candidates, the city agrees to promote blacks to police sergeant and fire lieutenant at the rate of 1 black to 1 white, to promote blacks to two of the next four police lieutenant vacancies, to promote a black to one of the next two police captain vacancies and to one of the next two fire captain

³ The proposal of the Guardian Association would freeze all promotions of whites in the police department until blacks were appointed to 4 positions as captain, 8 as lieutenant, and to 25% of the sergeants. It would also call for the hiring of 3 blacks for each white as police officer. Such draconian measures, even if permissible as a part of a judicial remedy, can hardly be viewed as necessary ingredients of a fair and adequate settlement.

vacancies, and to promote blacks to subsequent vacancies in the higher level positions in the departments at twice the percentage of blacks in the positions from which promotions are traditionally made; and, (6) subject to the availability of qualified candidates, the city agrees to promote women to police sergeant at the rate of 1 woman to 3 men and to promote women to higher level positions in the police department at the percentage of women in the positions from which such promotions are traditionally made. For purposes of these provisions, the certification, hiring, or promotion of a black woman is counted both towards the goal for blacks and towards that for women.

Study of these provisions indicates that, while comprehensive, they nevertheless preserve a substantial opportunity for whites and males to be hired or promoted in the two departments. Moreover, the goals of the city are in the settlement expressly made subject to the caveat that the decree is not to be interpreted as requiring the hiring or promotion of a person who is not qualified or of a person who is demonstrably less qualified according to a job-related selection procedure.

Secondly, these provisions for potentially preferential treatment are limited both in time and in effect. They are to expire when the percentage of blacks or women in a particular job approximates the percentage of blacks or women, respectively, in civilian labor force in Jefferson County, Alabama. Additionally, provisions of the settlement provide a mechanism for the decrees to be dissolved after a period of six years. It will be noted that the four criteria for approval of an affirmative action program set forth by the Eighth Circuit in *Valentine v. Smith*, 654 F.2d 503, 50 LW 2066, 26 FEP Cases 518 (July 21, 1981), are clearly met in the present case.

The objectors treat this case as one in which discrimination on the basis of race or sex has not been established. That is only partially true, at least as it relates to positions in the police and fire departments. This court at the first trial found—and the Fifth Circuit agreed—that blacks applying for jobs as police officers and firefighters were discriminated against by the tests used by the Personnel Board to screen and rank applicants. The evidence presented at the second trial established, at the .01 level of statistical significance, that blacks were adversely affected by the exam used by the Personnel Board to

screen and rank applicants for the position of police sergeant. Since governmental employers such as the City of Birmingham have been limited by state law to selecting candidates from among those certified by the Board, one would hardly be surprised to find that the process as a whole has had an adverse effect upon blacks seeking employment as Birmingham police officers, police sergeants, or firefighters—regardless of whether or not there was any actual bias on the part of selecting officials of the City. A natural consequence of discrimination against blacks at entry-level positions in the police and fire departments would be to limit their opportunities for promotion to higher levels in the departments.

Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City—that, notwithstanding this court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of a "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. According to those figures, 79 of the 480 police officers are black, 3 of the 131 police sergeants are black, and none of the 40 police lieutenants and captains are black. In the fire department, 42 of the 453 firefighters are black, and none of the 140 lieutenants, captains, and battalion chiefs are black.

There has been no judicial finding of discrimination against female candidates for positions in Birmingham's police and fire departments, nor indeed was there at the first trial any contention that the examinations administered by the Personnel Board for those positions had any adverse impact upon women to whom the tests were administered. However, evidence at the second trial—as to which no findings have yet been entered—reflected a more immediate form of discrimination against women who might be interested in such positions, rendering them ineligible for appointment to the basic entry-level positions without regard to examination scores. Disqualification from the key entry-level positions also resulted in foreclosing the opportunities for departmental promotions.

For many years announcements for positions as police patrolman and firefighter were restricted to males only. A

separate position of traffic citation officer, restricted to females, was created for the City of Birmingham; but it provided no promotional opportunities within the department. In 1970 the separate classification of policewoman was established for Birmingham. Not until late 1974—over two years after Title VII became applicable to governmental employment—did the Personnel Board delete the male-only restriction for firefighters and combine the positions of patrolman and policewoman. Minimum height and weight requirements for police officers and firefighters continued to be specified by the Board to the time of the second trial of this case. Presumably in view of the intervening Supreme Court decision in *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 10 (1977), the Personnel Board did not at the second trial, at which these explicit and implicit barriers to employment of women were challenged, seek to defend these practices.

The impact of these restrictions can be seen in the employment statistics for Birmingham's police and fire departments as of July 21, 1981. According to these figures, women constitute 53 of the 480 police officers, 3 of the 131 police sergeants, none of the 40 police lieutenants and captains, none of the 453 firefighters, and none of the 140 lieutenants, captains, and battalion chiefs in the fire department.

While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination. Moreover, as earlier noted, the remedial steps are limited in duration, expiring as particular positions generally reflect the racial and sexual composition of the labor market in the county as a whole; they provide substantial opportunity for employment and advancement of whites and males; they do not require the selection of

blacks or women who are unqualified or who are demonstrably less qualified than their competitors. The goals for certification, employment, and promotion as outlined in the proposed decrees, together with various related changes which complement those objectives—such as elimination of height and weight requirements, and the elimination or reduction of certain time-in-grade requirements for promotions—are due to be approved by this court under the teaching of *United States v. City of Alexandria*, 614 F.2d 1358, 22 FEP Cases 872 (5th Cir. 1980).

The Firefighters Association has argued that, given the vacating by the Fifth Circuit of the panel decision in the *City of Miami* case, 614 F.2d 1322, 22 FEP Cases 846, no changes in the civil service rules should be approved without its consent as a union, citing *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 14 FEP Cases 218 (5th Cir. 1977). The point, however, is that—unlike the situation in the *City of Miami* case—none of the rules to be altered under the proposed consent decree is a matter of contract with the union. Rather, the case *sub judice* is like that involved in the *City of Alexandria*, a decision left intact when rehearing was granted in the *City of Miami* decision. One may reasonably assume that en banc rehearing was granted to consider the consequences upon a proposed settlement of non-concurrence of a union which was party to collectively-bargained rules, and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements.

The Firefighters Association has also attacked the portions of the proposed decrees that would eliminate the requirement that applicants for the firefighter position have a high school diploma (or GED equivalent) and the provision under which the City of Birmingham would agree that applicants would not automatically be disqualified by virtue of a prior criminal conviction or arrest. The Association has not, however, demonstrated why this court should prevent the Personnel Board or Birmingham from making those changes if—whether to aid in settling this litigation or otherwise—they want to do so. Moreover, it should be noted that the elimination of the educational requirement for firefighters is not absolute—under the decree such a requirement can be imposed by the Personnel Board upon proof that it has no adverse impact because of race or sex or that it is valid under the *Uniform Guidelines*.

Nor does the proposed decree prohibit Birmingham from considering for particular positions, such as that of firefighter or police officer, the effect of a criminal record—it rather states that in such circumstances the city shall consider the nature of the position, the nature and age of the crime, and the success or failure of rehabilitation efforts.

The court has reviewed with care the provisions of the proposed settlements to which objections have been raised, as well as those portions to which no objection has been raised. Whether or not the proposed decree would in each instance correspond to some finding of discrimination which this court might make or provide the same remedial relief which this court might order is not the question. The settlement represents a fair, adequate and reasonable compromise of the issues between the parties to which it is addressed and is not inequitable, unconstitutional, or otherwise against public policy. Accordingly, the court's approval will be manifested by appropriate orders adopting the decrees tendered.

One further matter should be addressed: the motion to intervene filed by the Firefighters Association, Gray, and Sullivan subsequent to the hearing on the settlement. This litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal. While the Firefighters and Gray were permitted to be heard in opposition to the settlement, and the court fully considered their objections, intervention at this time as parties to the litigation is clearly untimely and must be denied.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEFFERSON COUNTY, *et al.*,

Defendants,

CIVIL ACTION
NO. 75-P-0666-S

JOHN W. MARTIN, *et al.*,

Plaintiffs,

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants,

CIVIL ACTION
NO. 74-Z-17-S

ENSLEY BRANCH OF THE
NAACP, *et al.*,

Plaintiffs,

v.

GEORGE SEIBELS, *et al.*,

Defendants.

CIVIL ACTION
NO. 74-Z-12-S

ORDER AND JUDGMENT

Having reviewed the complaints, discovery, evidence adduced at trial and the fairness hearing held on August 3, 1981, and other pleadings and matters of record in these consolidated actions, and having determined that, notwithstanding the reten-

tion of jurisdiction, there is no just reason for further delay in entering a final judgment in these actions as between the plaintiffs and the defendant Jefferson County Personnel Board and named defendant officials of the Board and the defendant City of Birmingham and named defendant officials of the City:

In conformity with the Memorandum of Opinion to be filed subsequently and entered in this cause; it is ORDERED, ADJUDGED and DECREED as follows:

1. Individual notice of the proposed settlements of these actions, of the conditional approval of the proposed consent decrees, and of the hearing for the consideration and final approval of the proposed consent decrees and any objections thereto, was timely given to all members of the classes who could be identified through reasonable effort. Supplemental notice of the proposed settlement was provided in Birmingham newspapers.

2. The best notice practical under the circumstances has been given and the notice given complies with the requirements of due process.

3. The consent decrees between the plaintiffs and the defendant Jefferson County Personnel Board and named defendant officials and City of Birmingham and named defendant officials which were provisionally approved by this Court on June 8, 1981 are fair, reasonable, adequate and lawful and are hereby finally approved and entered in full and final resolution of the plaintiffs' claims of employment discrimination against blacks and women by these defendants.

4. The award of costs and attorneys fees if any shall be determined in accordance with the provisions of the consent decrees.

5. Jurisdiction is retained by this Court as recited in Section XII of the consent decree of the Jefferson County Personnel Board and Section XXI of the consent decree of the City of Birmingham.

6. The Clerk is directed to enter a final judgment as to these parties in the respective causes.

SO ORDERED this 21st day of August, 1981.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

For Plaintiff United States of America:

/s/ Caryl P. Privett August 5, 1981
Date

For Plaintiffs in Martin, *et al.*,
City of Birmingham, *et al.*:

/s/ Susan W. Reeves August 5, 1981
Date

For Plaintiffs in Ensley Branch
of the NAACP, *et al.* v. Seibels, *et al.*:

/s/ Oscar W. Adams, III 8/6/'81
Date

For Defendant, City of Birmingham:

/s/ James P. Alexander 5 August 1981
Date

For Defendant, Jefferson County
Personnel Board

/s/ David P. Whiteside, Jr. August 5, 1981
Date